

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

In re: : 05-44481  
DELPHI CORPORATION, : One Bowling Green  
Debtor. : New York, New York  
: July 25, 2008

TRANSCRIPT OF HEARING  
BEFORE THE HONORABLE ROBERT D. DRAIN  
UNITED STATES BANKRUPTCY JUDGE

## APPEARANCES:

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(Appearances continue on next page.)

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

### 3 APPEARANCES (Continued) :

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1                   THE Court: Be seated.

2                   THE COURT: All right. Delphi Corporation.

3                   MR. FRIEDMAN: Good morning, Your Honor. This is  
4 Edward A. Friedman with Friedman, Kaplan, Seiler, and Adelman  
5 representing the plaintiff, Delphi Corporation.

6                   The defendants are the moving party so I think I  
7 should sit down and let the moving parties speak.

8                   THE COURT: Right. Whoever wants to speak first  
9 for the movants should speak.

10                  MR. SHORE: Good morning, Your Honor. Chris Shore  
11 from White and Case for the defendants AMLP and ADAH.

12                  I'd like to give you quickly a road map of how the  
13 defendants are divided. I'll be speaking first with respect to  
14 issues which I'll describe. Mr. Falcone will be addressing  
15 issues relating to limitations on liability. Mr. Kirschbaum  
16 will be dealing largely with issues related to piercing the  
17 corporate veil. Mr. Rosenthal with respect to whether or not  
18 the plaintiff has pleaded itself out of a breach of contract  
19 claim, and then Mr. Lacey with respect to specific Goldman  
20 issues.

21                  Obviously, we're here on a 72 or a 7012 Motion to  
22 Dismiss the complaint in its entirety. I won't address  
23 anything with respect to the standards and I won't, and I don't  
24 think any of the defendants are going to be challenging the  
25 factual allegations point by point. I think it's fair to say

1 though that all the defendants believe the operative  
2 allegations of this complaint are deficient and materially  
3 untrue, and if we get to discovery I'm sure we'll be able to  
4 show that.

5 Obviously, though an important point to the extent  
6 that the record on this motion to dismiss contradicts the  
7 factual allegations and particularly the conclusory allegations  
8 of satisfaction and conditions or reliance, the Court need not  
9 credit those.

10 Fundamentally, I'm going to be addressing one  
11 point.

12 THE COURT: Before you get to that --

13 MR. SHORE: Sure.

14 THE COURT: -- I want to say just once during the  
15 hearing, and I'm saying it here--I don't normally say it during  
16 a hearing on a Motion to Dismiss but as I've said a number of  
17 times in this case in addition to the legal issues at stake,  
18 there may be reputational issues at stake--those in the  
19 audience, particularly those who are not lawyers, should  
20 understand that when the parties are referring to the facts  
21 today they're referring to the facts as set out in the  
22 complaint. They're not referring to facts as adjudicated by me  
23 or as found by me.

24 The Court takes the facts as set forth in the  
25 complaint, except, as Mr. Shore notes, when those facts are

1 flatly contradicted by a document incorporated into or referred  
2 to by the complaint or in some other permissible way.

3 MR. SHORE: We thank you for that qualification,  
4 Your Honor, particularly in light of the filings that were  
5 recently made in other complaints which we may touch on today.

6 Fundamentally, I'm going to address one point  
7 which is whether, even if you accept all the allegations as  
8 true, Delphi has pleaded any legal theory on which they can  
9 recover more than \$250 million in money damages from the plan  
10 investors. That's ultimately what this complaint is about and  
11 when you read the opposition, what the opposition is about.

12 If what we're talking about is \$250 million in  
13 money damages, there's a simple complaint to be pleaded with  
14 respect to the EPCA and the commitment letters. But that's not  
15 what this debtor has done. They've pleaded claims, or  
16 attempted to plead claims for fraud, they've attempted to plead  
17 specific performance, invoking Section 1142, invoking Section  
18 510, seeking to void the limitation in Section 11(b). All of  
19 that is an attempt by the debtor to get something more out of  
20 this action than money damages capped at \$250.

21 I'm going to start with fraud which is from my  
22 perspective the claim which is most directly aimed at avoiding  
23 the contract and trying to get damages both in quantum and type  
24 of damages that aren't permitted under the contract.

25 Here's the central point with respect to the fraud

1 and you can carve all other things away. An allegation that a  
2 contracting party always intended to commit an efficient breach  
3 is not a fraud. You have to find that it is in order to allow  
4 this claim as pleaded to proceed.

5 To start with where you have to start with any  
6 fraudulent misrepresentation and fraudulent inducement claim,  
7 which is the actual allegations of the complaint, and if you  
8 look specifically at the allegations as opposed to the  
9 generalized allegations of what people were saying, what people  
10 were relying on, there are only three operative allegations.

11 The first is the quote of the testimony of Mr.  
12 Tepper at the December 7th hearing with respect to a deal is a  
13 deal and a handshake is a handshake.

14 The second is a statement in an affidavit which  
15 was submitted to the Court in connection with that hearing that  
16 AMLP has committed a minimum of \$1.1 billion of its own  
17 capital.

18 The third is the alleged plot that existed both  
19 prior to and after the entry of that agreement to commit an  
20 efficient breach even if all the conditions to consummation of  
21 that agreement had been fulfilled by Delphi.

22 The first two pleaded frauds, misrepresentations  
23 of fact are classically non-actionable.

24 The first statement beyond being incredibly vague  
25 about what "a deal is a deal" means has to be taken in the

1 context of the entire proceeding there. It is not, when you  
2 take it in context, that hearing, fair to say that what Mr.  
3 Tepper was telling either the Court or Delphi was that  
4 irrespective of any rights and remedies and conditions and  
5 written commitments of the parties in the EPCA, I will close  
6 this deal, because that's what Delphi needs to make it mean and  
7 we're to proceed to the fraud claim based upon that allegation.

8                   It's not a fair reading. It's not a  
9 misrepresentation of fact. I'll come back when I deal with the  
10 third misrepresentation as to that kind of contingent claim  
11 that under certain circumstances I will close this deal and  
12 under circumstances I won't close this deal.

13                   The second allegation that he committed \$1.1  
14 billion of AMLP's funds has to be read in the context of the  
15 entire affidavit which was submitted which makes clear in the  
16 next paragraph, which wasn't quoted, that the deal was of  
17 course subject to written commitments and conditions.

18                   So both of those allegations in the end fairly  
19 read just bring you right back to the contract. If there was a  
20 right under the contract to send the termination notice on  
21 April 4th, even if Delphi had satisfied all of its conditions,  
22 then these can't be actionable frauds. You can't turn the  
23 breach of contract into a fraud that way.

24                   Now again, I mean I think if we get to discovery  
25 on that I think that there would be actual facts that come out

1 with respect to what the parties' intents were at the time are  
2 going to be very different than as pleaded.

3 THE COURT: I don't want to waste time on those  
4 types of points.

5 MR. SHORE: So we come to a point in dealing with  
6 those two misrepresentations, a point which the debtors really  
7 haven't addressed. Assume they are true, assume that the  
8 statements made were as broadly intended as Delphi says they  
9 were. "A deal is a deal" means notwithstanding that my lawyers  
10 have spent months negotiating these agreements, I'll close come  
11 hell or high water. I won't terminate this agreement if it's  
12 uneconomic to do so or if it's uneconomic to close it.

13 Under New York law, under Michigan law, whatever  
14 matters, when you sign a contract that says my contract  
15 contains all of the understandings of the parties and  
16 supersedes any prior statements like that, they can't rely on  
17 those statements to satisfy the burden even in a pleading stage  
18 of showing reasonable reliance.

19 So leave aside the practical notion or the  
20 impracticability of their notion that notwithstanding the  
21 negotiation of the EPCA, what Mr. Tepper was saying was I'll  
22 close the deal come hell or high water, they can't as a matter  
23 of law rely upon that in establishing a fraudulent inducement  
24 claim.

25 THE COURT: Well, I'm sorry, you seem to me to be

1 shifting gears here for a second. I thought where you were  
2 going was the notion that a fraud claim that overlaps with the  
3 contract claim--since contracts may be breached and that's an  
4 element of what happens when you enter into a contract--it  
5 doesn't set forth a claim for fraud subject to the  
6 Bridgestone/Firestone exceptions. Now you seem to be saying  
7 something different.

8 MR. SHORE: I am saying with respect to these two  
9 misrepresentations, the misrepresentations to the effect that  
10 I'll close the deal notwithstanding what the documents say,  
11 they can't rely upon those.

12 THE COURT: Well --

13 MR. SHORE: Leave aside Bridgestone/Firestone --

14 THE COURT: -- but now you're just basically  
15 saying there's no breach; right? You're just saying that what  
16 he said was true because the documents say differently, the  
17 documents are consistent with what he said?

18 MR. SHORE: No. What he said was the documents  
19 are going to be what controls here. A deal is a deal means  
20 whatever the parties have agreed to in the agreement is --

21 THE COURT: Right. I understand. So that's why  
22 it seems to me you're shifting gears and saying that they  
23 couldn't rely on this because the contract controls and there's  
24 no breach of the contract.

25 MR. SHORE: That's exactly right.

1                   THE COURT: But that just goes to a separate point  
2 which one of your colleagues is going to address which is that  
3 there's no breach. I want to focus on the issue of whether  
4 there's a fraud claim in light of your contention that it  
5 overlaps with, as you refer to it, an "efficient breach."

6                   MR. SHORE: I don't think --

7                   THE COURT: Assume a breach for the moment. One  
8 of your other colleagues is going to try to convince me that  
9 for the motion to dismiss' purposes there's no breach, but I  
10 really want to focus in on the point where I thought you were  
11 going, which is they're just pleading breach and an intention  
12 not to perform and that's, under New York law and Michigan law,  
13 you contend, insufficient to establish fraud.

14                  MR. SHORE: Okay.

15                  THE COURT: To plead fraud.

16                  MR. SHORE: I'd like to loop back at some point  
17 then, Your Honor, with respect to the issue on breach, because  
18 I don't think what I'm saying is there was no breach of  
19 contract. I'm saying if the contract does not provide for a  
20 specific performance, then a delivery of a termination notice  
21 and intent to deliver a termination notice which is provided in  
22 the contract can't be overridden by a pre-contractual statement  
23 that I thought that the termination notice was going to be  
24 delivered under different circumstances. As I said, I can loop  
25 back to that.

1                   But the Bridgestone/Firestone issue comes up  
2 really with what is the core of their claim which is this non-  
3 disclosed alleged intent on the part of AMLP to commit an  
4 efficient breach? If and when we got to closing it turned out  
5 that the deal was under water by more than \$250 million, under  
6 all circumstances Delphi was going to -- sorry, Appaloosa was  
7 going to walk away from the deal.

8                   THE COURT: In essence, it was a \$250 million  
9 negative option?

10                  MR. SHORE: Yes.

11                  First, when dealing with those claims which are  
12 really set out in Paragraphs 129 to 133 of the complaint, you  
13 have to be careful with respect to the time alleged. All of  
14 those allegations claim the nondisclosure and an obligation to  
15 disclose from the period December 1 through April 4th, in  
16 dealing with the fraud claim, and really in a fraudulent  
17 inducement claim you can only deal with respect to what was  
18 said or not said up to the time of the contract. Anything that  
19 wasn't said till later is really a question of what are the  
20 obligations under the contract with respect to disclosing an  
21 intent to deliver a termination notice.

22                  THE COURT: But they're not saying it's just  
23 fraudulent inducement. They're saying it's fraud in general.

24                  MR. SHORE: Well, but the cases are clear with  
25 respect to--let's talk again about the post-closing period.

1 The EPCA has been signed and Appaloosa is not disclosing that  
2 it intends to deliver a termination notice if the deal is under  
3 water on [inaudible]. All they're alleging is a breach of the  
4 duty of the contract. In fact, they keep saying the best  
5 efforts obligations are what requires you to disclose that and  
6 to make it clear what's going on. You can't in that instance  
7 turn a breach of contract into a fraud by saying that what  
8 you're doing is violating a duty established by the contract.

9 THE COURT: Do you think -- let me posit a  
10 different point. I appreciate that this is only there because  
11 of the incorporation of Paragraphs 1 through 112 in the claim,  
12 but they have done that. They allege that Appaloosa  
13 surreptitiously met with lower case "investors"--

14 MR. SHORE: Additional Investors.

15 THE COURT: -- and either with them developed a  
16 strategy which included interfering with the bank financing  
17 and/or [unintelligible] they were aware that there would be  
18 interference with the bank financing and shorting the stock not  
19 only to make a profit off of it but also to lead to the  
20 disparagement of the company's stock in the marketplace and  
21 again to have the effect on the financing to chill it.

22 It's also the case that under the EPCA those  
23 investors were required to be party to the confidentiality  
24 agreements and that any dealings between the company and the  
25 investors, between the debtors and the investors would have to

1 be through Appaloosa. Now of course since I used the word  
2 surreptitious instead of using the word -- or that they allege  
3 that this is all kept from Delphi, why isn't that a fraud  
4 separate and apart from an intention to breach the contract?

5 MR. SHORE: Let me deal with each of the three  
6 allegations, and two of them get grouped together.

7 With respect to the interfering with bank finance,  
8 the allegation is there to establish that the bank finance  
9 condition in 5(t) was relieved.

10 THE COURT: Is that why it's there?

11 MR. SHORE: I believe that's why it's there.

12 THE COURT: Do they say that?

13 MR. SHORE: That is --

14 THE COURT: Why did they incorporate that into the  
15 cause of action?

16 MR. SHORE: Because if --

17 THE COURT: That's not relevant to the equitable  
18 subordination?

19 MR. SHORE: It may be relevant to equitable  
20 subordination which I can come to. Whether or not it  
21 constitutes --

22 THE COURT: You should move on to a different  
23 point. That's not a point --

24 MR. SHORE: Well, let me deal with the --

25 THE COURT: I'm not required to read into why the

1 debtor put something into a complaint when you make an  
2 allegation that is that serious and that frankly in my mind  
3 would constitute a bankruptcy crime under 18 USC,

4 MR. SHORE: Again, I know --

5 THE COURT: Again, this is all in the context of a  
6 Motion to Dismiss --

7 MR. SHORE: Right.

8 THE COURT: -- where I take the facts as pled and  
9 I don't make a finding. But it's a serious allegation.

10 MR. SHORE: Yes, it is. To the extent Appaloosa  
11 interfered with the bank finance that would be a violation of  
12 the contractual duty and they've not established any other duty  
13 beyond the contract with respect to that.

14 THE COURT: Really? You think that anyone else  
15 could be free to interfere with the bank financing like that,  
16 separate and apart from whether they had a contract?

17 MR. SHORE: Delphi has not pleaded anything with  
18 respect to that. Right? At best their allegation is  
19 surreptitiously and without doing anything because it was too  
20 smart to do so, it directed people to not buy bank debt. That  
21 would just go to whether or not Delphi was ever able to satisfy  
22 5(t).

23 THE COURT: No, I told you don't go there. Don't  
24 go to eliminate the purpose for that allegation.

25 MR. SHORE: With respect to shorting of the stock

1 be very careful with respect to the allegations because this is  
2 going to come up in the context of the creditors committee  
3 complaint. There is no allegation in this complaint after the  
4 debtors conducted their investigation that Appaloosa did  
5 anything with respect to shorting. There's a bare allegation  
6 without any facts attached to it that Appaloosa was responsible  
7 for it. In the absence of -- now, that can be I suppose one of  
8 two things. Either it was directed or it's legally  
9 responsible. But I think based upon where that investigation  
10 was that "responsible" in that circumstance does not mean that  
11 Appaloosa was directing any short sales. To the extent with  
12 respect to both of these issues, something was going on, either  
13 interference with bank finance or an allegation or a conspiracy  
14 to short, the Court has separate remedies with respect to that  
15 other than saying that there was a fraud in connection with the  
16 EPCA which allows the parties to avoid the commitments in the  
17 EPCA, which is what the fraud claim as pleaded in that section  
18 asks for.

19 I know they incorporate by reference the  
20 allegations of that. But the fraud claim as pleaded is you  
21 need to avoid the EPCA and the debtor's rights under the EPCA  
22 because there was a fraud committed in connection with the  
23 EPCA. That's the fraud claim which I'm arguing right now. As  
24 I said, equitable subordination is a different issue with  
25 respect to those limited allegations. But the fraud claim as

1 pleaded is because there was a conspiracy, we're afraid to sue  
2 for the inducement, and that's the problem.

3 THE COURT: You're saying they're entitled to what  
4 for the fraud?

5 MR. SHORE: In the context of the claim I believe  
6 the fair reading of the complaint is that what they're trying  
7 to do is establish, on the fraud claim, establish that the  
8 existence of the post contract and conspiracy forms a basis to  
9 allow them to get around the provisions in the EPCA.

10 THE COURT: Well, which provisions?

11 MR. SHORE: The punitive damage waiver, the  
12 limitation on liability, the ability of the parties to, under  
13 12(h) of the contract deliver a termination notice and have no  
14 liability except for willful breach.

15 THE COURT: Are they allowed to do that under  
16 Bridgestone/Firestone?

17 MR. SHORE: Are the debtors allowed to -

18 THE COURT: Given the Bridgestone/Firestone  
19 exception on special damages, is that something that they're  
20 entitled to do?

21 MR. SHORE: So let's go back to special damages  
22 then and back to the pre-contract and nondisclosure.

23 THE COURT: No, I'm focusing on you said they were  
24 using this as a way to get around the damage cap. I'm asking  
25 you is that something that not only are they-- well, something

1 that they were permitted to do and that in fact is an exception  
2 to the "you can't plead fraud to go around an efficient  
3 breach"?

4 MR. SHORE: I don't think that's what  
5 Bridgestone/Firestone says. If we could compartmentalize this  
6 to some extent and then leave aside the post-contracting  
7 nondisclosures and whether those may be three items you listed  
8 would form an independent basis to assert an independent fraud  
9 claim against AMLP, and go back to whether or not they can  
10 contend that the efficient breach concept, the hidden intent to  
11 commit an efficient breach is a basis for pleading a fraud  
12 claim, I don't think Bridgestone/Firestone, which is dealing  
13 with a fraudulent inducement, is saying that the existence of a  
14 damage cap here is a basis for turning every breach of contract  
15 claim into an inquiry into the parties' subjective intent as to  
16 how they were going to perform the contract, not whether they  
17 were going to perform the contract.

18 THE COURT: What about the VTech case?

19 MR. SHORE: Well VTech, what VTech does if you  
20 look at the limitation on liability there was where they were  
21 trying to disclaim willful misconduct, not a willful breach.  
22 The point there was if what you're talking about is an  
23 independent tort in that instance, the contract is not going to  
24 allow you to disclaim liability for willful acts, but willful  
25 misconduct, gross negligence, fraud. We're not contending

1 that. But in connection with the fraudulent inducement issue,  
2 which is whether or not we had a duty to disclose an intent to  
3 commit an efficient breach at a later date, that's not willful  
4 misconduct. That's in fact what the cases say is an efficient  
5 breach, is a willful breach.

6                   So I don't think with VTech, VTech doesn't create  
7 an exception and say that any time the parties have a  
8 limitation on liability in their contract they are exposing  
9 themselves to a fraudulent inducement claim. If you go back to  
10 Bridgestone/Firestone and special damages and what special  
11 damages means in the context of the New York cases, what  
12 they're really talking about are damages which are not ones  
13 that foreseeably and proximately flow from the breach of the  
14 contract.

15                   Those are not damages that are alleged here. In  
16 fact, quite the opposite. The debtor is saying this was all  
17 foreseeable. This is exactly what was going to happen in the  
18 context of an efficient breach. So I don't think VTech gets  
19 you around the -- or gets you into a Bridgestone/Firestone  
20 exception.

21                   Ultimately where this claim fails is on two very  
22 clear issues of law. The first is you can't have a contingent  
23 misrepresentation. Right? The allegation of this complaint is  
24 that under some circumstances Appaloosa would perform, under  
25 certain circumstances Appaloosa wouldn't perform. If it was in

1 the money it would close, if it was out of the money it  
2 wouldn't close. That's not how you plead the fraud claim. The  
3 fraud claim is this person had no intention of doing any deal  
4 ever is exactly --

5 THE COURT: Where does that come from? Where do  
6 you get that from?

7 MR. SHORE: That comes from in New York there's  
8 the Deal Time case, in Michigan the McMullen case, and the  
9 whole line of cases if you go back --

10 THE COURT: So you think that Michigan case really  
11 stands for that proposition?

12 MR. SHORE: I think McMullen stands for the  
13 proposition that if your performance under the contract is  
14 based upon a contingency --

15 THE COURT: A future event that the parties knew  
16 about, since that's what's the holding of that case.

17 MR. SHORE: The parties here had no -

18 THE COURT: No, not in that case that you cited to  
19 me for the proposition that you say it stands for. I've read  
20 it. It doesn't stand for that proposition at all.

21 MR. SHORE: McMullen was a question of at the end  
22 of the day --

23 THE COURT: I know what it said and whoever wrote  
24 your brief and cited that case better read it again because it  
25 doesn't say what you said it said at all. Now, this is a theme

1 I will come back to several times today.

2                   In addition to that, why isn't it a fact that they  
3 have alleged that under a certain circumstance Appaloosa  
4 certainly knew it was not going to perform. How is that  
5 contingent? The only contingency was whether the facts  
6 changed, not their intention. So that seems specious to me.

7                   I understand your point about VTech and I'm going  
8 to ask the debtors about that. I understand your basic point  
9 about overlap on intention not to perform at all. But the  
10 other arguments I think are a waste of trees.

11                   MR. SHORE: We focused on where the debtors -- and  
12 we can have long debates over where to draw the line between  
13 contract and tort and the difference between the Second Circuit  
14 and the New York Court of Appeals and do that. But ultimately,  
15 Delphi is asking you to draw the line between contract and tort  
16 where no case has ever done it before.

17                   If a party negotiates a contract that says we have  
18 a right to send a termination notice as of a drop dead date and  
19 has a provision in it that says under those circumstances you  
20 have no liability --

21                   THE COURT: You're starting on breach again. All  
22 right? I'm really -- someone else is going to argue to me that  
23 there is no breach here. I'm just focusing on Appaloosa and  
24 the fraud issue right now.

25                   MR. SHORE: I'm focusing on the issue of efficient

1 breach because what allows you to make an efficient breach in a  
2 case is an understanding of what your damages are. So in a  
3 case in which you've negotiated a cap, a \$250 million cap on  
4 any liability --

5 THE COURT: Who's going to argue the point about  
6 the cap?

7 MR. SHORE: I will argue it to some extent.

8 THE COURT: You just said Mr. Falcone was.

9 MR. SHORE: I'm going to argue it in the context  
10 of specific performance.

11 THE COURT: All right. I accept your point. Are  
12 you arguing in terms of specific performance, Mr. Falcone?

13 MR. FALCONE: I'm going to address certain aspects  
14 of it, Your Honor.

15 THE COURT: Look, there's no fraud about an  
16 intention to breach if there's no breach. I accept that. So  
17 you don't need to make that point to me.

18 MR. SHORE: It's not the point I'm making, Your  
19 Honor.

20 THE COURT: Okay.

21 MR. SHORE: The point I'm making is in order to  
22 find an actionable fraud here, the Court has to make an inquiry  
23 to the subjective intent of the parties as to their intent to  
24 rely on a provision in the contract. If the parties negotiated  
25 a provision which said you could walk away and pay \$250

1 million, what turns that into a fraud in this case as alleged  
2 is that when that was negotiated Mr. Tepper intended to use  
3 that provision or intended that he might use that provision  
4 under certain circumstances but then did not intend, or did not  
5 intend to use it if it was economically viable to do so.

6 The only difference between that and any other  
7 case would be that the person who didn't intend to use a  
8 termination provision under certain circumstances wouldn't be  
9 liable for fraud. That's what I'm saying, that line has never  
10 been drawn there to ask the Court to go into the subjective  
11 intent of the parties as to whether they intended to use the  
12 contract provisions or not because this contract, as I'll get  
13 to, provides that on the drop dead date you can send a  
14 termination notice and you are liable for \$250 million. That's  
15 what it contemplates. Whether a breach or not, you can send a  
16 termination notice on the drop dead date.

17 They're saying that becomes a fraud because Mr.  
18 Tepper intended to use that under certain circumstances. But  
19 that turns every case with a termination, a drop dead  
20 termination and a limitation on liability into a subjective  
21 inquiry by the Court into the intent of the parties when they  
22 negotiated. Did you really mean to use that or were you just  
23 putting that in there because your lawyers wanted that in  
24 there?

25 THE COURT: I'm sorry, you're just losing me on

1 that. I'm not following what you're saying. A fraud case  
2 often looks into the intent of the parties, so you must be  
3 making some other proposition.

4 MR. SHORE: The basis of the fraudulent inducement  
5 claims and going all the way back to Greenstein is the Court  
6 does not want to look into the subjective intent of the parties  
7 in entering into the contract because it's irrelevant. Whether  
8 we intended to be bound to the contract or not is irrelevant.  
9 If the contract says we're bound, we're bound.

10 A narrow exception came up through the cases in  
11 all the states with respect to what if on these future  
12 performances there never was an intent to perform?

13 THE COURT: No, I understand that point. The  
14 argument -- let me just paraphrase what I think you're saying,  
15 which is that every contract has within it the possibility of a  
16 breach, and just as every contract has within it the  
17 possibility that the contracting party may have to pay damages;  
18 and, therefore, a fraud claim that says that you intended to  
19 breach when you entered into it or you intended to not be able  
20 to pay damages is within the contemplation of the parties, and  
21 therefore, is not really a fraud. It's an overlap on the  
22 contract claim.

23 MR. SHORE: That's right.

24 THE COURT: Okay.

25 MR. SHORE: Section 12 and Section 11 expressly

1 contemplate that the parties would get to the closing date,  
2 that either party would have satisfied its conditions, and that  
3 the other party was still free to deliver a termination notice  
4 on that date. It's a point that was raised on reply and I  
5 think we really need to go into it. It's what let the debtor  
6 have a fiduciary out in this case under this contract. It's  
7 not just an equitable balancing. The way the contract is  
8 structured, the language going to a specific performance is  
9 drafted for both parties. Under their reading of the contract  
10 that this was hell or high water, even if they had an offer for  
11 \$1 billion more for the equity and we got to the closing date,  
12 Appaloosa was free to waive all conditions and they would not  
13 have had a fiduciary out, an ability to get out of this  
14 contract unless you can read it the way we read it. You can't  
15 turn it into a fraud by saying that the parties intended to do  
16 that any more than Delphi would be liable for fraud if it has a  
17 memo in its files which said if we get to closing and Cerberus  
18 comes back and offers us \$1 billion more, we intend to go with  
19 Cerberus. That was a right which was contemplated by the  
20 parties and built into this contract.

21 THE COURT: I guess that's the way I go back to  
22 the first line of questions that I was at. They allege, in  
23 addition to what you're saying, they allege, which clearly they  
24 did too, that Appaloosa wasn't up front like that about its  
25 rights under the contract. Instead, it felt that it had to

1 work behind the scenes to kill the deal secretly instead of  
2 simply saying look, we're going to pay \$250 million; tough.  
3 That starts with of course not Paragraph 78 and 79 but Mr.  
4 Tepper's testimony at the December 3rd hearing where there was  
5 a discussion of optionality in the agreement, but that  
6 discussion was over a financing condition, the \$585 million  
7 cap, not about a walk right for \$250 million.

8                   So I think what they're alleging has problems if  
9 it's couched as you've couched it, but I don't think that's the  
10 only way they've couched it.

11                  MR. SHORE: As I said, leaving aside those three  
12 instances of interference with the bank finance, the alleged  
13 responsibility for shorting, and you know, the confidentiality  
14 --

15                  THE COURT: What about Mr. Tepper's testimony at  
16 the December 3rd hearing? There was a lot of colloquy about  
17 optionality and Appaloosa's commitment to the deal, et cetera.  
18 Do you think -- how do you respond to the debtor's argument  
19 that that testimony alone is sufficient to show that the Court  
20 and the parties were misled?

21                  MR. SHORE: I mean I addressed it to some extent.  
22 Let me elaborate on it.

23                  First of all, the deal is a deal comment came up  
24 in the context of something different. It came up --

25                  THE COURT: No, I'm talking about the testimony in

1 its totality. I can read you sections from it if you want.  
2 But the import of it, and I said it, is that one of the reasons  
3 I'm ruling on this is I don't believe the parties want to come  
4 back here again and deal with litigation over this deal. That  
5 was the context of dealing with a very narrow provision which  
6 is the only provision that the creditors committee and debtors  
7 were worried about.

8                   But anyway, it's not just the "deal is a deal"  
9 comment.

10                  MR. SHORE: No, but I think in the totality of  
11 that testimony the point was, there is a written contract here  
12 and we want to abide by that written contract. I don't think  
13 it can be fairly read as saying that any aspect of that  
14 contract would be waived or modified. Quite to the contrary, I  
15 think the colloquy came up with respect to the 585 cap as to  
16 whether or not the parties would move and Mr. Tepper said I  
17 don't think I can get them to move. It was going to be a  
18 strict following of the contract. Ultimately what the fraud  
19 claim, at least in pre-closing nondisclosure, comes down to is  
20 the debtor's subjective belief that when April 4th came a  
21 termination notice wouldn't be sent, that it would only --

22                  THE COURT: Well, the debtor's belief that there  
23 would not be an "efficient breach if the deal was under water,  
24 and I guess the issue I have, and I don't think it's an easy  
25 one for the debtors by any means, is whether Mr. Tepper's

1 testimony at the hearing was one where the parties, including  
2 the Court, would have assumed that he had always intended to  
3 reserve the right to commit an "efficient breach."

4 MR. SHORE: The way to fix that subjective intent,  
5 though, is easy. You put a provision in the contract that says  
6 the parties hereby agree there's no adequate remedy at law and  
7 agree that specific performance is the remedy to be had in the  
8 context of a breach. In the absence of that, you can't imply  
9 into the contract and the termination provision on the drop  
10 dead date a right of the debtors which is enforceable under New  
11 York law that it would only be sent if the deal above water.

12 Under what circumstances does the termination  
13 notice get sent, a termination notice gets sent on the drop  
14 dead date except when there is a breach of the contract?  
15 Because there's a breach of contract termination provision and  
16 one that was sent here, but you've got a [unintelligible]  
17 termination on the drop dead date which is not qualified by  
18 whether you're in breach or not. I can come back to that a bit  
19 later.

20 But that's it. That was there. That provision  
21 was there before the Court when it was approved. Delphi had  
22 had that contract in hand. It can't now come and say --

23 THE COURT: Even if it was ready, willing, and  
24 able to close with all the other conditions met on the day  
25 before the drop dead date?

1                   MR. SHORE: Yes.

2                   THE COURT: I think all your arguments come down  
3 to whether you can walk for \$250 million.

4                   MR. SHORE: Well, let's turn there and I can come  
5 back.

6                   THE COURT: In that regard, and this is as much a  
7 question for the debtors to focus on, Mr. Tepper was asked,  
8 "Why did you invest this level of personal time and commitment  
9 in working with Delphi?" The answer, "I just asked my wife  
10 that question last night, so I don't know. I guess at some  
11 point, you know, I guess we made a deal. We're trying to  
12 figure out how to get this deal done. We have some  
13 relationship with the parties in the case. We'd like to see  
14 this thing come out of bankruptcy if we can. We have fiduciary  
15 responsibilities to a lot of different people and a lot of  
16 investors so we can't ever violate that. But in the fact that,  
17 and the same thing I said before, you know, you make a  
18 handshake and you make a handshake to what it is. That's why.  
19 I don't know, I don't know how else to say it."

20                   So [unintelligible] and he does refer to the fact  
21 that he has his investors that he owes fiduciary duties to on  
22 this fund. He also says he's trying to make this happen, make  
23 it work.

24                   MR. SHORE: The premise of this complaint and the  
25 reason why the debtors are trying to get above \$250 million in

1 damages is we're not talking about a scenario in which this was  
2 a dollar under water. The question is under this contract and  
3 dealing within specific performance could either party be  
4 compelled, going back to the example, if Cerberus came forward  
5 with a \$1 billion topping bid, could we compel the debtors  
6 nonetheless to sell the asset to us? Conversely, if this asset  
7 was worth \$1 billion less --

8 THE COURT: But that was a separate provision that  
9 deals with that.

10 MR. SHORE: No. It all actually funnels through  
11 12(h). In fact, if we can start at 12(h) I can get a handout  
12 or if Your Honor has 12(h) later. Do you want me to hand --

13 THE COURT: The separate provision specifically  
14 acknowledged that the debtor is going to enter into an  
15 "Alternative Transaction."

16 MR. SHORE: They could but they still had to  
17 terminate the agreement. The alternate transaction allows them  
18 to send a termination notice. That termination notice in and  
19 of itself doesn't have effect until you get to 12(h).

20 THE COURT: They paid for the right to enter into  
21 a deal with Cerberus or whoever else in the Alternative  
22 Transaction section. You guys didn't pay for the right to walk  
23 separate from the damages cap --

24 MR. SHORE: All right. So let's --

25 THE COURT: -- if that right applies.

1                   MR. SHORE: We're in a period -- all those things  
2 they're doing an Alternative Transaction. They have a right to  
3 send a termination notice. If we don't want to close -- if we  
4 believe they [unintelligible] warranties can send a termination  
5 notice. All those termination notices in Section 12 funnel  
6 into 12(h) which tells you exactly what happens when a  
7 termination notice is sent. When a termination notice is sent,  
8 no party has any liability under the contract except for  
9 liability for willful breach and the provisions of 10 through  
10 18 survive. That's what 12(h) says. When they deliver a  
11 termination notice because they've got an alternate  
12 transaction, first of all, they have to pay \$82.5 million.  
13 Second, they remain liable for a willful breach. The debate  
14 was going to be in that instance whether or not their  
15 exercising a fiduciary out to fulfill their fiduciary duties to  
16 creditors was a willful act or a non-willful act. But it still  
17 goes through 12. 12 is what -- 12(h), it cuts off the parties'  
18 liability

19                   THE COURT: If the point you're making, which I  
20 thought you were making, is that there's parallelism, I don't  
21 see it. It's a separate fee the debtors pay.

22                   MR. SHORE: They pay the fee but the consequence  
23 of the release -- and if you look at the actual --

24                   THE COURT: I guess I just -- I mean we're talking  
25 about fraud here. The debtors specifically acknowledged that

1 they might do something, i.e. accept a higher and better offer,  
2 and they paid for it up front. That to me seems quite  
3 different than saying that because there is a damages provision  
4 capping under certain circumstances the damages of the  
5 investors that you [unintelligible].

6 MR. SHORE: All I'm saying is that the fraud  
7 claim, that fraudulent inducement claim hinges on the Court  
8 finding that the contract allows for a specific performance  
9 because if the contract does not allow for specific  
10 performance, Delphi is not entitled --

11 THE COURT: I understand that point. But I'm  
12 pointing at two other things. One we talked about already and  
13 I don't know if there's much more to add to that, although I  
14 can quote you some interesting language from Mr. Tepper on that  
15 concept, which is the idea of behind-the-scenes secretly  
16 interfering with other aspects of the deal. Mr. Tepper had  
17 some very harsh words about one of his partners about that type  
18 of behavior at the December 3rd hearing. I think he would  
19 agree that that's separately actionable. In fact, he had his  
20 lawyer send a letter to Goldman Sachs threatening just that.

21 But then the separate point is, did Tepper commit  
22 fraud when he said what he said in the context of the hearing  
23 on December 3rd?

24 MR. SHORE: I'm saying that if the contract  
25 allowed him to commit an efficient breach there is no duty to

1 disclose under any law that you intend to use a contract  
2 provision under certain circumstances. Delphi, as a  
3 sophisticated party, is not entitled to rely in any respect on  
4 any statement outside the contract that says or they could  
5 interpret as saying don't worry about the contract provision.  
6 If we get to April 4th and if you have satisfied your  
7 conditions, I will close under any circumstances because that's  
8 what drives you into having to make a subjective inquiry into  
9 subjective intent as to whether or not he intended to use that  
10 provision or intended that he might use that provision, or  
11 didn't even think about that provision.

12 THE COURT: Okay.

13 MR. SHORE: That's why the fraudulent inducement  
14 claim has to go, because otherwise no party who puts a  
15 provision in the contract which caps liability and allows the  
16 termination on the drop dead date can be free of what the New  
17 York Courts and the Michigan Courts don't want, which is  
18 turning every breach of contract claim into a fraud claim.

19 THE COURT: Well, I'm going to ask this more  
20 plainly. Sometimes I ask questions just to get, you know, a  
21 response, so don't take this too personally, but do you think  
22 the New York Courts and the Michigan Courts don't have an  
23 interest in witnesses being candid to courts in their  
24 testimony?

25 MR. SHORE: Yes, they do.

1                   THE COURT: So --

2                   MR. SHORE: I do not, and as I said, I do not  
3 think that with respect to those allegations that you've laid  
4 off to the side with three, that they may have a question --

5                   THE COURT: No, no, I'm focusing on Mr. Tepper's  
6 testimony now. I guess ultimately what I believe might, and  
7 I'm saying this "might," I don't want the debtors to address  
8 this, might survive your objection -- leaving aside those three  
9 -- is the allegation that Mr. Tepper was not candid to the  
10 Court and the parties when he testified in favor of the deal on  
11 December 3rd, and that in fact he misrepresented as to his  
12 intentions.

13                  MR. SHORE: All right. But that does not make it  
14 a fraudulent inducement. That may raise other issues --

15                  THE COURT: No, I already said that. They are not  
16 pleading, they're just saying fraud and damages for fraud. So  
17 the issue is how do I deal with that point that they've made,  
18 which is that he wasn't candid, that he misled the Court and  
19 the parties at a time when the approval of going forward with  
20 the modified EPCA was at issue and it might not have been  
21 approved but for that testimony?

22                  MR. SHORE: I think that the way to handle that is  
23 to say that there was no basis for Delphi to reasonably rely on  
24 that testimony as modifying the expressed rights of the parties  
25 under the contract particularly in the context where Mr. Tepper

1 is saying that he does have fiduciary duties, that if one's  
2 fiduciary duties say efficiently breach the contract, don't buy  
3 an asset that's worth X because you can limit your liability to  
4 250, that that will be done. In fact, the only way they could  
5 have had a justifiable reliance--

6 THE COURT: Well, even if -- but I guess your  
7 point is even if that's not the case, you can always breach the  
8 contract notwithstanding anything; right?

9 MR. SHORE: Notwithstanding -- except to the  
10 extent where the contract with the parties -- and even then it  
11 doesn't always work where you have a specific performance  
12 provision. We'll get to why there isn't one in this in a bit.  
13 But until you have that, a party is free and has for hundreds  
14 of years been free to walk from a contract and suffer damages.

15 THE COURT: Okay.

16 MR. SHORE: The Court can't move the line on fraud  
17 to say that well that's qualified by whether or not you  
18 intended at the time you entered into the contract --

19 THE COURT: Well, if Mr. Tepper had said the only  
20 option [inaudible] are the financial conditions and those are  
21 conditions that could be objectively determined, then it seems  
22 to me if he intended at that time, notwithstanding that  
23 statement, to intentionally breach, notwithstanding the  
24 fulfillment of those conditions, if it was a good idea to do so  
25 for Appaloosa -- to me that would be a crime. I'm not sure

1 that he said that at the December 3rd hearing.

2 MR. SHORE: That's why I started with the question  
3 as to whether or not what they quoted is an actionable  
4 misrepresentation in the context of the law of fraud on what "a  
5 deal is a deal" means.

6 THE COURT: But now I --

7 MR. SHORE: They must draw the line between a deal  
8 is a deal and why are you doing this because I want to get this  
9 deal done and saying I want to get this deal done  
10 notwithstanding what my contract says because unless you put in  
11 that notwithstanding what the contract says, you end up right  
12 back to the contract which is under this contract is a party  
13 free on April 4th to send a termination notice and suffer money  
14 damages of the \$250 million? Because if he is allowed to do  
15 that, there's nothing, no misrepresentation in that statement  
16 because it is stating a deal is a deal. If I'm allowed to  
17 walk, I can walk, and the same thing goes the other way. If  
18 they -- leave aside Cerberus or anything else, if Delphi got to  
19 the end of the day and wanted to do an alternate plan, a stand  
20 alone plan and go to a change of recommendation, they're free  
21 to do that. They just subject themselves to liability for  
22 willful breach in 12(h) and kick back to 11(b).

23 The reason you can't say that those provisions can  
24 be read as permitting specific performance is the definition of  
25 liability.

1 [Pause in proceedings.]

2 MR. SHORE:

3 As I said before, all termination notices delivered under  
4 Section 12 funnel through 12(h). 12(h) says that upon the  
5 termination all rights and obligations under the agreement  
6 shall terminate without liability to any party except that  
7 nothing contained herein shall release any party from liability  
8 for willful breach and the covenants of confidentiality and  
9 whatnot remain.

10 Our view is that when you did that, when you  
11 delivered, all liability is cut off except for willful breach.  
12 So if you had a non-willful breach of any sort, there is no  
13 liability under this contract. It's exactly the way it's  
14 written, that's exactly the way it should be read. But you  
15 exposed yourself to liability under any legal theory for a  
16 willful breach. That's the provision which would allow the  
17 debtors to terminate the EPCA and enter into an alternate  
18 transaction.

19 The provision before which allows them to  
20 terminate by sending a notice for an alternate transaction does  
21 not cut off liability in any respect. In fact, it says that it  
22 is, even if you pay the alternate transaction fee, does not  
23 release you from claims. 12(h) is what releases the parties  
24 for claims.

25 Where Delphi gets into trouble with their

1 interpretation, which I think is pretty clear that liability  
2 means money damages, is that even if they sent a termination  
3 notice for an alternate transaction, their reading would be  
4 that the only thing not cut off was our claim for money  
5 damages, but left open the possibility for a specific  
6 performance. When you talk about the common law specific  
7 performance, this here is going that way, the type of unique  
8 asset, which would make it difficult for Delphi to claim that  
9 it was free to walk.

10 So if under 12(h) it only means money damages,  
11 they've read out all the stuff they said before.

12 THE COURT: What's the point of this as related to  
13 fraud?

14 MR. SHORE: Well, I think it's moving into  
15 specific performance, but if you have a right to do this under  
16 the contract to commit an efficient breach, they can't turn  
17 that into a fraud because they say we intended to use Section  
18 12 this way versus we didn't think about using Section or we  
19 never intended to use Section 12.

20 It all funnels back to whether or not ultimately  
21 this contract can be -- the closing can be compelled versus the  
22 parties suffer money damages because if it can't be compelled,  
23 there's nothing fraudulent about his statement a deal is a  
24 deal. The deal was effectuated here by sending a termination  
25 notice.

1                   So 12(h), all right, is the provision that says --  
2 essentially sets the table for the complaint here which is the  
3 only thing that can survive once the termination notice has  
4 been sent is a claim for willful breach.

5                   Then you go back to 11(b) and that tells you what  
6 the parties' liability is for a willful breach. When you get  
7 to 11(b), the liability for willful breach under the agreement  
8 for any reason under any legal theory for any act or omission  
9 occurring prior to the subsequent approval date shall not  
10 exceed \$100 million or \$250 million after the disclosure  
11 statement.

12                   So the only thing that can happen under this  
13 agreement, under the agreement, after a termination notice has  
14 been sent is a claim by one party for a willful breach not to  
15 exceed \$250 million.

16                   THE COURT: Okay. Now, doesn't that get you back  
17 to VTech since it refers to damages under the agreement? VTech  
18 says well, the agreement limited damages; therefore, you have  
19 special damages, you can sue for fraud.

20                   MR. SHORE: But now we're going back to changing  
21 the premise of the argument which there's no misrepresentation  
22 if you either by nondisclosure or affirmative disclosure that  
23 says that a termination notice would not be sent and we would  
24 not claim that this was either not a willful breach --

25                   THE COURT: Oh, I understand, I understand. If

1 they hadn't alleged a breach claim you guys could walk  
2 completely.

3 MR. SHORE: But it's not just a breach claim.  
4 It's a question of the remedy. If there is no remedy of  
5 specific performance under this deal, then there's nothing  
6 misrepresentational about not saying I'm not going to commit an  
7 efficient breach. If the contract provides that you can commit  
8 an efficient breach and you can't be compelled to close, you  
9 can't misrepresent that you're not going to commit an efficient  
10 breach because your contract says and contemplates that there's  
11 not only going to be an efficient breach, it's going to be one  
12 in which the conditions have been met and nonetheless you  
13 decide not to close by April 4th. So it turns out to be not a  
14 misrepresentation either by affirmative misstatement or  
15 omission.

16 If it's a money damages case, there can't be a  
17 misrepresentation here because the money damage case  
18 presupposes that an efficient breach is allowed then and they  
19 can suffer the damages. The contract says --

20 THE COURT: The damages are limited. You're still  
21 going back -- I'm still going back to VTech on that point.

22 MR. SHORE: Well, I mean I addressed VTech. I  
23 don't think what VTech is saying that if you commit an  
24 efficient breach you can --

25 THE COURT: No, because that wasn't the issue

1 before the Court.

2 MR. SHORE: That's right.

3 THE COURT: It also didn't say the price of  
4 bananas is 20 cents a bunch. I mean, you know, I think you  
5 have to deal with the fact that Judge Koetl thought that  
6 because of the cap on damages in the contract they could sue  
7 for fraud. Now, I agree the contract said they can sue for  
8 tort, said it.

9 MR. SHORE: Except for --

10 THE COURT: Right, it permitted a suit for tort.  
11 That goes back to a reading of this contract. But if I assume  
12 -- whoever of your colleagues is going to try to convince me  
13 otherwise, if I disagree with them that this provision does not  
14 [unintelligible] the debtors and that they could sue for a  
15 tort, for example, doesn't prevent them from suing for any  
16 tort, then why doesn't VTech be right on point? Because just  
17 as in VTech they would be permitted to sue for a tort because  
18 they're not excluded from suing for a tort, the tort of fraud.

19 MR. SHORE: Again, I sort of compartmentalize the  
20 post-contracting fraud --

21 THE COURT: No, no, this one I'm just talking  
22 about fraud right from the get go.

23 MR. SHORE: Right. The problem with that is we're  
24 not alleging in that instance an independent tort. We're  
25 alleging an intent to commit an efficient breach. Don't

1 forget, this is not a case in which the allegation has been  
2 made for some reason other than the parties wanted to save  
3 money, this didn't close. That might raise a different issue,  
4 but the issue here about whether or not the parties can commit  
5 an efficient breach is and always should be answered by the  
6 contract. If the contract says you can commit an efficient  
7 breach, nothing that was said outside the contract should  
8 change that. 12(h) and 11(b) read together say that --

9 THE COURT: Well, all right, all right. During  
10 the hearing on December 3rd, and I guess this may be as  
11 relevant as anything on this line of inquiry -- the debtors  
12 need to address this also -- at one point Mr. Rosenberg, the  
13 creditors committee's counsel, was quite concerned about one  
14 provision of the amended EPCA, with the \$585 million provision  
15 and he starts talking it at Page 268. He's worried that the  
16 debtor will trip over this condition. He says that, "We've  
17 learned [inaudible] the last 11 months or so that this EPCA is  
18 neither a commitment nor an agreement. What it is is a one-way  
19 option, a one-way option for Appaloosa and its co-investors to  
20 go forward if it decides it wants to." I say, "All right.  
21 That's overstating it." He says, "Perhaps. I suggest to Your  
22 Honor that it may not be."

23 His focus there, though, is not on the \$250  
24 million cap as an option, but on this covenant. He invokes the  
25 Court's -- he requests the Court's authority, and this carries

1 over to 271, in helping the committee to change that covenant.  
2 Much of the rest of the hearing is focused on whether I would  
3 do that or not. The focus is all on that aspect of  
4 optionality.

5 Then I say -- I'm sorry. So then he says, "So  
6 there are investors you could do a different transaction with  
7 but the price is going to be \$82.5 million and waiting to at  
8 least March 31st. So therefore," and then I say, "Well, let's  
9 explore that a minute. I appreciate that everyone focused on  
10 what happened over the last couple of months, poured over the  
11 legal options under the EPCA agreement and what could happen."  
12 Mr. Rosenberg agrees.

13 I said, "And obviously the cap on damages is an  
14 extremely relevant legal point that I'm sure everyone  
15 considered and it's referred to in the debtor's response. That  
16 being said, I heard the testimony from Mr. Resnick and I tend  
17 to agree with that. While there is some quantifiable effect of  
18 a higher interest cost, it's fairly small. I'm still of the  
19 belief that each of the institutions that are signed up to the  
20 EPCA is a real institution that wants to engage in business in  
21 the future, engage in transactions in the future, and in fact  
22 that they can't do deals unless they have the trust of the  
23 people across the table from them. The idea that they would  
24 ultimately hold you all up in a way that would be materially  
25 greater than the effect of such an interest cost on them would

1 have real consequences to them and I would not hesitate, as you  
2 know from the last three weeks, to explore those events in  
3 great detail. So there is a consequence in jerking people  
4 around, and frankly, that goes beyond the document, but the  
5 document itself has obligations in it to work to preserve the  
6 transaction. And I have before me the testimony that this  
7 isn't Mr. Tepper's doing, i.e. the jerking people around part  
8 and that it's all of his investors' doing. His testimony was  
9 in essence like this is herding a group of cats, and I think  
10 there's probably some truth in that."

11 So again, the issue I have is, in light of that,  
12 can the debtors allege that simply because Mr. Tepper didn't  
13 stand up then and say "well wait a minute, Judge, you know, we  
14 could always commit an efficient breach, we can always jerk  
15 people around," should I infer a fraud? This is for purposes  
16 of a motion to dismiss.

17 MR. SHORE: I would answer as follows. I would  
18 answer we're not talking about an incident that was where you  
19 were at \$585.2 million and we could not herd the cats and  
20 people were having a problem. Where we are now in the  
21 fundamental basis of this complaint is a dislocation outside  
22 the damage cap. We're talking about a dislocation of more than  
23 \$250 million, otherwise all of this is irrelevant. We're  
24 talking about people were jerking someone around over \$5  
25 million or \$10 million, or \$50 million. It may be a different

1 issue. But the complaint is premised upon a dislocation. That  
2 is it would only be efficient if closing the transaction lost  
3 you more than \$250 million. Because if you close the  
4 transaction inappropriately, we're coming back to Judge Drain,  
5 and everybody recognized that.

6 THE COURT: Well, I beg to differ with you on  
7 that, because the complaint alleges that Appaloosa went out of  
8 its way to cause the transaction not to happen without a  
9 willful breach on its own -- appearing to be on its own behalf,  
10 that it tried to change other events so that they didn't have  
11 to even pay the \$250 million.

12 MR. SHORE: Fair enough. Maybe I spoke outside  
13 the record on this.

14 THE COURT: Okay.

15 MR. SHORE: But even with respect to those  
16 allegations, that goes to whether or not the condition was  
17 frustrated and then our ability to raise 5(t) as a defense.  
18 But fundamentally we're talking about what did the parties  
19 intend if you add a dislocation either way outside 250? When  
20 you speak of fraud from the perspective of this side that the  
21 debtors, after having said what they said with respect to this  
22 contract and the inability to get specific performance in the  
23 context of the disclosure statement, in their statements before  
24 the Court, in their testimony before the Court, in their  
25 pleading filed in support of the reply in the EPCA about no

1 specific performance, the best the parties can do here is a  
2 capped quantum of damages. That speaks volumes to what the  
3 parties' intent was at the time with respect to whether there  
4 could be an efficient breach.

5 THE COURT: I'm talking about whether someone  
6 should have stood up after I said what I said. All right? I  
7 was the one that was talking, not Mr. Butler. I think whether  
8 or not I find that there was a fraud here or not based on what  
9 was alleged in the complaint or whether I dismiss the complaint  
10 or permit leave to re-plead on this point, it's not what the  
11 debtor said and what people responded to what the debtor said.  
12 It's what people didn't say in response to what I was saying.  
13 Maybe that's not actionable. I don't know. I'll ask the  
14 debtor. But I think we should move on.

15 MR. SHORE: Ultimately the question that just --

16 THE COURT: I appreciate that sharp practice may  
17 not rise to the level of fraud. Maybe the debtors can convince  
18 me otherwise.

19 MR. SHORE: In an environment in which nobody  
20 mentioned the possibility ever that this deal could be  
21 compelled even it was more than \$250 million under water --

22 THE COURT: I did. I did. You know, just move  
23 on. All right? In fact, I told you all that, at the hearing  
24 on the 1142, and I always felt that, and that's why I did not  
25 rule on the basis of the cap on December 7th. If you read my

1 ruling even if you're not in my head, you know that. Whoever  
2 is trying to argue judicial estoppel on that point, I suggest  
3 you start right there.

4 MR. SHORE: In the context of the deal, though, on  
5 whether or not -- because ultimately the question before the  
6 Court on specific performance is what does the contract say?  
7 Not what people subjectively intended or anything else and I --

8 THE COURT: Well, I mean you know, I don't want to  
9 be rude to you but, and maybe I misunderstood you when you gave  
10 your introduction but are you covering issues other than fraud?

11 MR. SHORE: Yes.

12 THE COURT: Okay.

13 MR. SHORE: Just specific performance with respect  
14 to how you can interpret this contract to provide for or  
15 prevent an efficient breach. I can understand that people --

16 THE COURT: But is someone else going to cover  
17 this same area?

18 MR. SHORE: No.

19 THE COURT: Okay. All right.

20 MR. SHORE: With respect to specific performance,  
21 and we've gone through 12(h) and 11(b). The only way you can  
22 find that specific performance of Section 2(a) is available is  
23 to read the liability in 12(h) and 11(b) to mean money damages  
24 like the debtors say. We can come to the issue of the  
25 commitment letters and the tiering of the structures. But if

1 liability means what the four dictionaries say it means, the  
2 New York Court of Appeals, and the Second Circuit, albeit in  
3 context other than this contract, liability is a broad term  
4 which encompasses legal responsibility in law or in equity.

5

6 So when you get to 11(b) which says that you can't  
7 have liability in excess of \$250 million, you can't be liable,  
8 legally responsible in law or equity for more than \$250  
9 million.

10 THE COURT: Well, it says under a legal theory.  
11 It doesn't say under law or equity.

12 MR. SHORE: Liability, the definition of liability  
13 in the dictionaries and in the New York Court of Appeals is  
14 that it means both an action in law or equity.

15 THE COURT: No, I'm referring to the phrase later,  
16 under any legal theory.

17 MR. SHORE: Right. That means you can't seek  
18 specific -- you can't seek an equitable claim under a fraud  
19 theory and you can't seek a legal claim under a fraud theory if  
20 it requires \$250 million. We don't have to -- that's a  
21 limitation of liability issue I'm not going to address right  
22 now. But fundamentally, if you read the word "liability" as  
23 defined which is a legal responsibility in law or equity, you  
24 can't have legal responsibility under law or equity for any  
25 reason under any legal theory including --

1                   THE COURT: It doesn't say under law or equity.  
2 It says the aggregate liability. You're reading into it the  
3 law and equity part. That's not part of your quote.

4                   MR. SHORE: I'm reading a definition of liability.  
5 Liability is an expansive term which means legal responsibility  
6 in law or equity. The New York Court of Appeals just dealt  
7 with this when somebody tried to bring an equitable claim even  
8 though the statute passed on liability.

9                   THE COURT: But we're dealing with a set of cases  
10 that requires a fairly tight level of drafting where the  
11 parties are contracting out a specific performance. In the  
12 commitment letters, the financing letters, the backstop  
13 letters, the parties seem to know how to draft it right to fit  
14 those cases. I think to me you're reading more into this,  
15 given the case law, than is permissible.

16                   MR. SHORE: I'm not saying we have not said in  
17 connection with this that Section 11(b) operates as a waiver of  
18 all specific performance remedies. It does not. That would  
19 contradict with our reading of 12(h). All the parties are  
20 exposed to whatever remedy the Court wants to fashion in law or  
21 in equity for a willful breach. But under no circumstances can  
22 it cost more than \$250 million. If the Court wanted to  
23 specifically enforce the --

24                   THE COURT: So you're basically saying you could  
25 have specific performance but it's capped at \$250 million and

1 that's what this provision says?

2 MR. SHORE: If you had a confidentiality provision  
3 that was being violated, you could order that to be followed,  
4 not if it requires the payment of more than \$250 million.  
5 That's what it says. I'm not reading anything into it except  
6 taking a definition from the dictionaries, the New York Court  
7 of Appeals, and the Second Circuit with respect to what  
8 liability means and putting it in this context.

9 THE COURT: All right. And you're not also then  
10 reading the case law like the Deutsche case about what you need  
11 to say generally in terms of reading out the remedy like this.

12 MR. SHORE: It does not -- I have not found any  
13 cases that say the sole and exclusive way to waive specific  
14 performance is using sole and exclusive language. It's not.  
15 Those cases fundamentally stand for the proposition that the  
16 Court's responsibility in connection with a contract  
17 interpretation is to read the contract and give it its plain  
18 meaning which expresses the intent of the parties whether or  
19 not they had a subjective intent or not. That's what the  
20 Court's job is.

21 THE COURT: Okay.

22 MR. SHORE: And if we can argue about drafting  
23 what should have been and what should have been out, the flip  
24 side is true. We all know how to make it clear that specific  
25 performance is an available remedy. You say there's no

1 adequate remedy of law and you say specific performance is the  
2 available remedy.

3 THE COURT: I guess, at least as I read the cases,  
4 that you don't have to say that to have specific performance.

5 MR. SHORE: You don't have to. I mean it doesn't  
6 end the inquiry any more than the absence of sole and exclusive  
7 [unintelligible] whether specific performance is available.

8 THE COURT: Okay.

9 MR. SHORE: When you look at all the other things  
10 beyond the language of the contract, there isn't anything the  
11 debtors point to which supports their reading that liability  
12 means money damage is the only thing that happened was a --  
13 with the sending of the termination notice was money damages  
14 for non-willful breaches or above 250. It's contradicted on  
15 the statements they put before. It's contradicted with the  
16 structure of the deal. We get to --

17 THE COURT: This is a motion to dismiss, though,  
18 so aren't those all points you'd be making at summary judgment  
19 or -- I mean your argument has to be plain meaning.

20 MR. SHORE: Right. The plain meaning of this --  
21 well, you can take into consideration the debtor's post-  
22 contract statements with respect to what this provision means  
23 outside the context of litigation, absolutely. They put in the  
24 disclosure statement and you find that the disclosure statement  
25 means that there's no specific performance provision, and the

1 only thing we can do is to get damages up to the cap, that's  
2 absolutely in the record on this motion. I think the  
3 explanation for what that meant totally falls apart.

4 THE COURT: Okay.

5 MR. SHORE: But if you look at the structure of  
6 this deal, this is on this motion to dismiss as well because  
7 they don't get specific performance unless they can get  
8 specific performance of the commitment letters. If you're  
9 operating under the terms of the documents, if AMLP  
10 [unintelligible] aren't funding the full amount, you can't have  
11 a closing, you can't have specific performance.

12 THE COURT: How do I know that?

13 MR. SHORE: Because there's not enough money.

14 THE COURT: How do I know that?

15 MR. SHORE: Based upon the structure of the deal  
16 and sole capitalization as admitted by the debtors and as  
17 disclosed in the disclosure statement or the commitment  
18 letters.

19 THE COURT: Where is that shown?

20 MR. SHORE: I'll pull out the disclosure statement  
21 discussion. Maybe I'll bring it up on reply, Your Honor.

22 THE COURT: Okay. What about either -- well, I  
23 guess one of your colleagues is going to talk about veil  
24 piercing, but what about the exception to a waiver under -- if  
25 I can find it here -- Kalisch-Jarcho, I mean unless someone

1 else is going to talk about that.

2 MR. SHORE: Someone else is going to talk about  
3 that but in the context of deal structure it's just why  
4 specific performance is inconsistent with both the pleadings  
5 and the contracts that are in front of you. The debtors aren't  
6 alleging that any of the other plan investors were materially  
7 misrepresenting to you in the Court that they were going to  
8 close this deal. I don't fairly read that complaint as  
9 alleging that the other plan investors did anything which would  
10 get around their waivers of, or limitations on liability and  
11 waiver of specific performance in their commitment letters. I  
12 mean fundamentally --

13 THE COURT: But Appaloosa picked up the difference  
14 under the contract.

15 MR. SHORE: Appaloosa picked up the -- no, they  
16 picked up the 1.1. They would not have picked up all of the  
17 other parties' commitments. You would get into a situation  
18 where if you said all right, Appaloosa's waiver doesn't apply  
19 so Appaloosa, you must fund. But unless you can get the other  
20 two entities to fund, you can't compel specific performance.

21 THE COURT: But Appaloosa is picking it up for the  
22 investors.

23 MR. SHORE: The additional investors, not the  
24 other two funds.

25 THE COURT: Not the funds but the actual

1 investors. Not their parents, but the actual investors.

2 MR. SHORE: It does not pick up liability for the  
3 plan investors. It picks up its own liability up to the whole  
4 funding amount of Appaloosa.

5 THE COURT: Now, you make two different points.

6 MR. SHORE: Okay.

7 THE COURT: You're saying first that the only one  
8 who's alleged that did anything really bad that would fit into  
9 the exception of specific performance is Appaloosa; right?

10 MR. SHORE: Well, I wouldn't even say that  
11 [unintelligible], but yes.

12 THE COURT: Obviously you're not accepting that  
13 Appaloosa did anything either but I thought you were saying the  
14 premise of your argument is that for there to be specific  
15 performance, for it not to be moot, you need Harbinger [Ph.]  
16 and Pardus [Ph.], you need their money,

17 MR. SHORE: I'm actually -- I'm not --

18 THE COURT: I think you did need their money given  
19 the back stop by Appaloosa.

20 MR. SHORE: That's all right. It's difficult with  
21 this many defendants to divide it up.

22 Now, the point I'm making is when you're looking -  
23 - when you're trying to discern the intent of the parties as to  
24 whether there could be an efficient breach here, whether the  
25 parties always contemplated that specific performance was an

1 available remedy consistent with the language that's  
2 interpreted, the language put into the agreement with what the  
3 debtors were saying, you also have the structure of the deal  
4 which was always set up with the funds capitalizing the special  
5 purpose entities only to the amount of the cap on damages and  
6 that under no circumstances --

7 THE COURT: Wait. They represented that they had  
8 the full money to pay.

9 MR. SHORE: They had the full commitment to pay  
10 could be consistent with the contract, and the contract itself,  
11 the commitment letters say that notwithstanding anything else,  
12 notwithstanding any other term or condition of this letter  
13 agreement, under no circumstances shall the liability of AMLP,  
14 or in that case each of the three funds hereunder, for breach  
15 of this letter agreement exceed in the aggregate the cap for  
16 any reason, the cap being 250, under no circumstances shall  
17 AMLP be liable for punitive damages, and three, the liability  
18 of AMLP shall be limited to monetary damages only. The  
19 structure of this deal is set up that the only -- that if  
20 there's a breach of the underlying EPCA, if there's a breach  
21 which is the predicate to specific performance on that deal,  
22 but if there's a breach, the only thing AMLP has to do is fund  
23 up to 250.

24 THE COURT: Okay.

25 MR. SHORE: And that deal is consistent with the

1 concept of allowing efficient breach. That structure is  
2 consistent. It's completely inconsistent with the notion that  
3 the parties always contemplated and intended that specific  
4 performance was available here because it was always going to  
5 put you in a position where if specific performance came up,  
6 you'd never be able to get sufficient funds to close the  
7 transaction.

8 THE COURT: I just pointed out a scenario where  
9 you would.

10 MR. SHORE: Well, that's what I'm saying, this is  
11 where we're getting back into fraud. No. Under the terms of  
12 the contract, what we're doing here is not voiding any  
13 provision of the contract. We're trying to discern the  
14 parties' intent in entering into this. The only thing you can  
15 discern from the structure of the deal --

16 THE COURT: Why didn't they put the same provision  
17 in 11(b) then? Why would you do it in such a roundabout way?

18 MR. SHORE: Because there are circumstances under  
19 which specific performance would be an available remedy. If  
20 someone was violating their best efforts, and Your Honor  
21 addressed this to some extent in 1142, as long as the order  
22 that the Court's writing is not putting us in a position to  
23 spend more than 250, 11(b) isn't handling it.

24 THE COURT: Okay.

25 MR. SHORE: So just from the perspective of

1 looking at what's in front of the Court, I don't think there's  
2 any fair reading of the contract which says that merely by  
3 using the term liability in 12(h) and 12 -- or 11(b) that the  
4 parties were either contemplating or intending that specific  
5 performance would be available even if it meant putting in a  
6 lot more into this deal than \$250 million.

7 THE COURT: Okay.

8 MR. SHORE: I don't -- I'm not going to dwell.  
9 I'm just closing out specific performance on the common law  
10 issues because I think a lot of them are going to be brought up  
11 on piercing the corporate veil and being able to put the deal  
12 together.

13 But ultimately, we do have a problem here, a  
14 pleading problem and matter of law on the issue of ready,  
15 willing, and able. The debtors made it very clear that they  
16 are not going to be ready, willing, and able to close at the  
17 time of judgment. What they intend to do --

18 THE COURT: All right. I have a -- I mentioned  
19 this problem before. I'm going to mention it now too. I want  
20 you to point to me one case -- before I do that, I'm going to  
21 distinguish between two different facts. I accept, and I think  
22 the debtors will accept, that if the remedy of specific  
23 performance is moot for some reason -- you know it can't be  
24 done -- the specific performance claim in the complaint will be  
25 dismissed. Name me one case that holds that absent that type

1 of mootness, the fact that additional conditions will have to  
2 be met for specific performance, i.e. it holds that the debtor  
3 is not today ready, willing, and able albeit that it would be,  
4 you know, tomorrow or the next day -- I'd like one case cited  
5 for that proposition.

6 MR. SHORE: Outside the real estate context I do  
7 have one case, I'll get the name of it in a minute, where they  
8 were unable to get the loan and the allegation was that  
9 [unintelligible] liability to get the loan and the Court said  
10 sorry, I'm not going to do that. I will cite that to Your  
11 Honor.

12 But then you end up in the position ultimately  
13 where we've gone through the specific performance analysis, the  
14 Court has ordered specific performance, and we're no further  
15 along than we were before if the debtors are saying they're  
16 going to try to recreate the financing.

17 THE COURT: Again, one case that says that.

18 MR. SHORE: Okay. Well --

19 THE COURT: The many cases that you have cited for  
20 that proposition, all of you, do not say that. In fact, in one  
21 of the cases you cited you switch the word in brackets in  
22 footnote 12 from "was" to "is," a very important change. I  
23 don't want that ever to happen in front of me again.

24 MR. SHORE: Ultimately --

25 THE COURT: So have we disposed with the ready,

1 willing, and able point now?

2 MR. SHORE: Yes, Your Honor.

3 THE COURT: All right.

4 MR. SHORE: With respect to 1142 and 510, which  
5 are my last two issues and I think we can dispose of them  
6 pretty quickly, based upon the debtor's opposition, I don't  
7 know that they are seeking to apply 1142 in a real way. We're  
8 not disputing that the Court has jurisdiction to do what it's  
9 going to do with respect to the EPCA, but we just don't see a  
10 scenario under which 1142 applies and that increases in any  
11 respect the debtor's available remedies.

12 THE COURT: Well, I understand the point unless  
13 the debtors can persuade me otherwise -- I don't see how they  
14 will -- 1142 doesn't authorize the Court to rewrite the  
15 contracts or the plan. But it does seem to me to be a very  
16 clear remedy, that would get around any argument about money  
17 damages being sufficient or anything like that, where congress  
18 specifically provided for a specific performance. I mean  
19 leaving aside whether in fact the contract permits specific  
20 performance, whether, you know, the plan that you're trying to  
21 enforce specifically says you can't enforce it this way, if  
22 you're able to enforce under the agreement, congress seems to  
23 say you can enforce it. It doesn't matter whether -- the Court  
24 doesn't even have to get into whether money damages are  
25 sufficient or not.

1                   MR. SHORE: But it would not undercut the  
2 obligation to follow at least at that point common law concepts  
3 under what circumstances do you get specific performance.

4                   THE COURT: Why? Why wouldn't it? It says  
5 "enforce the plan."

6                   MR. SHORE: I think you'd have, among other  
7 things, a vagueness issue there. If 1142 was to be interpreted  
8 as saying that notwithstanding the common law and any defenses  
9 such as ready, willing, and able or ability to close the  
10 transaction, or -- let me say it this way. With respect to no  
11 adequate remedy at law I think it probably does pick up that.  
12 But with respect to the other aspects of what it takes to get  
13 specific performance, I don't think it creates a right without  
14 standards to say okay, the deal is going to be done. I think  
15 the Court still has to import standards for the application of  
16 the code provision.

17                   THE COURT: Why?

18                   MR. SHORE: Because --

19                   THE COURT: I mean congress knew how to  
20 incorporate applicable non-bankruptcy law if it wanted to.

21                   MR. SHORE: Then it fundamentally raises the issue  
22 of under what circumstances, if the contract has not waived  
23 specific performance, the Court would order the plan to be --

24                   THE COURT: Right.

25                   MR. SHORE: -- consummated that way.

1                   THE COURT: Recognize it's a plan where the  
2 parties had voted on and the Court has confirmed an integrated  
3 transaction obviously in an environment that's different than  
4 your normal two-party contract environment. Why wouldn't it be  
5 reasonable to think that congress didn't want the Court to get  
6 into an analysis of whether money damages would be  
7 satisfactory, because at that point you'd have to deal with who  
8 gets what. You can't really carry out a plan if it's a stock,  
9 you're distributing cash to people where some people were  
10 before taking warrants and contingent rights. I mean it just  
11 seems to me that not only does the language say it but it makes  
12 evident sense to have specific performance in that context.

13                   MR. SHORE: What I was saying is leaving aside  
14 adequacy of damages, the issue would be, for example, in the  
15 1142 order is the Court required in ordering specific  
16 performance to maintain that the debtors follow and meet all  
17 conditions.

18                   THE COURT: Oh yes, no, I understand that. I mean  
19 unless the debtors are able to convince me otherwise, you can't  
20 order specific performance of something that isn't the plan or  
21 isn't the agreement incorporated in the plan.

22                   MR. SHORE: I wouldn't think it would get rid of  
23 issues with respect to feasibility of doing it. That is, for  
24 example, with the common law which says you can't order  
25 specific performance if it's going to be impossible. That

1 would also apply in -- that's why I'm saying I know you have to  
2 --

3 THE COURT: I agree. That's fine. But you can't  
4 -- no Court can -- you don't have to incorporate common law to  
5 that. No Court's going to order someone to do something that's  
6 impossible.

7 MR. SHORE: That was my -- my point is --

8 THE COURT: All right.

9 MR. SHORE: -- you have to incorporate the  
10 standards under which you would get specific performance under  
11 common law otherwise you get yourself caught up in a completely  
12 vague statute which --

13 THE COURT: Well, all right, I'm not agreeing with  
14 you on that point but you can go ahead.

15 MR. SHORE: With respect to any of the other  
16 claims, though, the only time 1142 would come in would be that  
17 limited instance. I don't know that that's -- we sort of see  
18 in the case where anybody said that but in respect to the other  
19 causes of action, this is a damage case. 1142 doesn't change  
20 that because there's no plan.

21 THE COURT: But given that rule, I don't see why  
22 you dismiss the claim. I'm not sure why you dismiss it anyway  
23 on the basis it's duplicative, which is what's been alleged.  
24 But it seems to me it's not duplicative. It gives the debtor  
25 an additional right that it wouldn't necessarily have under the

1 common law.

2 MR. SHORE: But it can't be applied. The only  
3 instance in which it can be applied in this case would be that  
4 limited one. Again, I'm not saying it can't in your example.  
5 But it can't be applied in instances, for example, on money  
6 damages or fraud.

7 THE COURT: Why not? I don't --why can't it?

8 MR. SHORE: Because there's no plan. 1142 just  
9 says the Court can do whatever is necessary to consummate the  
10 plan. If we're talking about money damages here --

11 THE COURT: Oh no, yes, but the basis for the  
12 motion to dismiss that cause of action and complaint was that  
13 it was duplicative of other causes of action. I don't think it  
14 is because it's different than the common law on damages, on  
15 whether money damages are adequate. To me, what congress said  
16 is the Court doesn't have to get into that inquiry as to  
17 whether money damages are adequate or not. So there's a reason  
18 for them to have pled it. Granted, if they can't get specific  
19 performance generally, then they're not going to win on that  
20 complaint either, but that wasn't. So on that basis, you know,  
21 it's not going to give the debtor any additional rights, but I  
22 don't think it should be dismissed.

23 MR. SHORE: Except to the extent, and I don't mean  
24 to belabor the point, if for example under the common law they  
25 have to show it was feasible and if Mr. Kirschbaum could

1 convince you --

2 THE COURT: I agree.

3 MR. SHORE: -- that you can't compel it, that 1142  
4 won't say it doesn't matter if you don't have the money, I'm  
5 going to order you to perform and if you don't perform you're  
6 going to be held in contempt. That's the issue that I think  
7 1142, there are going to be some circumstances under which 1142  
8 has to go out of this complaint.

9 THE COURT: When you say you don't have the money,  
10 are you referring to the debtors not having the financing?

11 MR. SHORE: Or if you find that the commitment  
12 letters, which are limited to money damages only, put everybody  
13 in the position that you can't close the deal and then we're  
14 just talking about -- I mean if --

15 THE COURT: No, I understand what you mean.  
16 That's fine. I agree with that.

17 MR. SHORE: Equitable subordination are the same  
18 issue. I mean the aspects of equitable subordination which  
19 we're seeking to dismiss with respect to the Court is this  
20 notion that if the Court finds that there's no breach of  
21 contract and if the Court finds that there was no fraud, then  
22 you can still have equitable subordination. That's where I  
23 think the case law is pretty clear that equitable subordination  
24 is not going to be used to resurrect claims which have been  
25 dismissed under valid legal theories.

1                   The point being is that if ultimately we find out  
2 on a motion to dismiss that there's no specific performance  
3 claim and that they haven't pleaded fraud, equitable  
4 subordination can't be let back in as the opening of the door  
5 to, you know, just a general equitable analysis of the parties'  
6 behavior. We didn't act fraudulently, we didn't breach a  
7 contract. You can't sue for equitable subordination.

8                   THE COURT: Don't those cases say that if you  
9 acted in -- all they're saying is that if you acted within your  
10 rights under your contract you won't be equitably subordinated.

11                   MR. SHORE: Right.

12                   THE COURT: They're not saying if you otherwise  
13 engaged in bad behavior, nevertheless you won't be equitably  
14 subordinated.

15                   MR. SHORE: As I said, I think that the aspects of  
16 this complaint that were obviously troubling Your Honor about  
17 the allegations of what we were doing, to the extent that we're  
18 permitted to do that under the contract, I'm not even going to  
19 argue that, but to the extent that what we're talking about  
20 with equitable subordination is that we had some duty to close  
21 that was independent of the contract and we didn't fulfill it,  
22 you can't equitably subordinate the claim on some notion that --  
23 -- and it just comes back to what --

24                   THE COURT: No, I understand. I understand that  
25 point.

1                   MR. SHORE: It comes back to what Your Honor said  
2 at the 1142 hearing. Look, we have a right to act under the  
3 contract, we have a right to act under the contract. This  
4 isn't going to turn into some general equitable analysis of  
5 whether we're nice people or not.

6                   THE COURT: Okay. I understand.

7                   MR. SHORE: So I mean with that I'll turn over to  
8 the others but, you know, with adopting their arguments.

9                   THE COURT: Okay.

10                  MR. SHORE: Thank you.

11                  THE COURT: That's fine.

12                  MR. FALCONE: Good morning, Your Honor.

13                  THE COURT: Good morning.

14                  MR. FALCONE: Marc Falcone from Paul, Weiss,  
15 Rifkind for defendant Merrill Lynch.

16                  Your Honor, I had planned to start my presentation  
17 with the case you mentioned, Kalisch-Jarcho [Ph.] but in the  
18 last exchange between you and Mr. Shore one point came up that  
19 I would just like to address.

20                  In thinking about 1142 and its relationship to the  
21 common law and the contract, I do think it has to be noted that  
22 the contract expressly incorporates in the common law of the  
23 State of New York. What the parties agreed to was in Paragraph  
24 16, a contract governed by the internal laws of the State of  
25 New York. In a footnote in their brief Delphi concedes that it

1 is not taking the position that 1142 can create any rights that  
2 are inconsistent with the rights under the contract.

3                   So I would submit for Your Honor's consideration  
4 that in order to displace the common law in this case you would  
5 have to override Paragraph 16 of the EPCA.

6                   Let me talk about Kalisch-Jarcho. I may actually  
7 talk about three cases from the New York Court of Appeals which  
8 I believe have to be thought of in succession. Kalish Jarco  
9 was the earliest. Kalisch-Jarcho was not actually a case that  
10 was about the enforceability of a liability limitation.  
11 Kalisch-Jarcho was a case that was actually about the  
12 interpretation of a liability limitation and what jury  
13 instruction the defendant was entitled to based on the  
14 appropriate interpretation of that provision in the contract.

15                   The Court in Kalisch-Jarcho had given -- the trial  
16 Court had given the jury an instruction instructing it that it  
17 could find for the plaintiff if it found that the defendant,  
18 who was the City of New York, had interfered in the contract.  
19 The city on appeal took the position that the provision in the  
20 contract entitled the city to an instruction that in fact there  
21 could be no finding for the plaintiff absent a showing of bad  
22 faith or I believe it was intentional misconduct.

23                   The Court reviewed to a limited extent the public  
24 policy exception to the enforceability of liability limitations  
25 in order to help it interpret the clause but then said

1 something very interesting in its holding. What the Court  
2 concluded is that, and this is a quote, that the city was  
3 entitled, quote, "at the very least to the instruction that it  
4 was advocating for from the Court."

5 So the only thing at issue before the Court of  
6 Appeals in Kalisch-Jarcho was whether the jury instruction that  
7 the city was in question was consistent with the public policy  
8 exception, meaning below the line, and a proper interpretation  
9 of the provision.

10 The next case from the Court of Appeals on this  
11 issue is the Sommer case. In the Sommer case the Court started  
12 out with its discussion about the sometimes murky distinction  
13 between contract and tort claims. But the Court didn't give up  
14 on that issue. In fact, in Sommer, the Court proceeded from  
15 that observation to identify a number of principles that are  
16 applied under New York law to distinguish contract from tort  
17 and concluded in that section of the opinion that indeed the  
18 plaintiff in that case could state a tort claim for gross  
19 negligence. The defendant in that case had argued that the  
20 duty to take care was incorporated in the contract and so a  
21 tort claim could not be alleged because of the overlap.

22 The Court rejected that position and said yes, you  
23 can state a separate tort claim. You can state a claim for a  
24 breach of a duty other than your duty under the contract, a  
25 tort claim for gross negligence. Only then did the Court

1 proceed with its analysis of the public policy exception.

2 The next case is Metropolitan Life, and in  
3 Metropolitan Life, as we detailed in our reply brief to the  
4 Court, the whole opinion in Metropolitan Life is focused. We  
5 now gravitated from Kalisch=Jarcho, which admittedly has some  
6 vague language in it, to Metropolitan Life where the Court  
7 starts its analysis distinguishing contract law from tort law,  
8 distinguishing the role of intent in contract and tort law.

1 just a breach of contract.

2                   So the Court needed to make a distinction that  
3 could make sense of the law between well, what do we mean by  
4 willful misconduct in a world where we say intentional breach  
5 is just a breach? In order to reconcile, in order to give  
6 meaning to willful misconduct that was consistent with the  
7 principle that an intentional breach is just a breach, the  
8 Court drew the line between contract and tort. It cited  
9 Professor Corbin's treatise. It noted that the only exceptions  
10 recognized by Professor Corbin were contracts of adhesion,  
11 which we know that we don't have here because of the  
12 allegations of how heavily negotiated the EPCA was, and tort.

13                   Then it looked back to its precedence in Kalisch-  
14 Jarcho and Sommer and it cited them in a footnote in a piece  
15 with quotations from the Restatement and Corbin that talk only  
16 about exceptions for tortious conduct.

17                   So I think it's important, Your Honor, to  
18 understand Bank of America in that context. Bank of America,  
19 as we pointed out in our brief, was a case in which the  
20 plaintiff alleged a scheme of extortion. The plaintiff alleged  
21 in that case that the defendant over a long period of time was  
22 repeatedly over and over and over failing to perform its  
23 obligations under the contract in order to create a situation  
24 of economic duress in order to extract a payment from the  
25 plaintiff that the Court said it could see absolutely no

1 colorable basis for in the agreement. In fact, the express  
2 provisions of the agreement in the Bank of America case  
3 contradicted what the defendant was doing. The agreement said  
4 you get costs and you get this much, and the defendant came  
5 back with a demand for a fee based on a percentage of the  
6 transaction that not only had no basis in the contract but  
7 clearly contradicted the provision.

8                   The Court in that case simply said looking at  
9 these facts I can infer that this was not just a breach of  
10 contract, that this was a scheme to coerce a non-contractual  
11 benefit, a non-contractual demand by imposing economic duress.

12                   Federal Court in this district I believe has  
13 recognized this principle in the DynCorp case, in the -- is it  
14 N2D2? I always forget what that stands for. They have  
15 recognized this principle and that when we think about this  
16 public policy exception and that when we think about what the  
17 Courts mean by willful, which is a separate issue from what the  
18 contracting parties may mean by willful, but when we talk about  
19 what the Courts mean by willful, we have to keep in mind that  
20 principle, that intentional breaches are just breaches.

21                   THE COURT: Well, I don't agree with you there.  
22 "Willful" is a separate issue. We're talking about the public  
23 policy exception to a breach damages limitation. I don't think  
24 that what "willful" means in various contracts has much to do  
25 with that.

1                   MR. FALCONE: No, I'm sorry, that was exactly the  
2 point I was trying to make, Your Honor, that the meaning of the  
3 word "willful" in those cases about the public policy exception  
4 is a separate issue --

5                   THE COURT: Okay.

6                   MR. FALCONE: -- from what contracting parties may  
7 mean.

8                   Now, it is possible in theory that parties chose  
9 the word willful because they were looking at those cases, but  
10 that would be a question of fact and that doesn't really have  
11 anything to do with it.

12                  So Your Honor, there is no allegation in this  
13 contract of any tortious conduct against any defendant other  
14 than Appaloosa. There's no allegation against Merrill.

15                  THE COURT: Well, it's fairly vaguely stated but  
16 they do say "with other investors" in a couple of places.

17                  MR. FALCONE: Well, I think, Your Honor, if that  
18 is intended to be an allegation against Merrill then we're  
19 entitled to know because --

20                  THE COURT: I agree with that.

21                  MR. FALCONE: I actually don't think -- I think  
22 the complaint is sneaky in that way and if that's what they  
23 want --

24                  THE COURT: Well, I wouldn't characterize it as  
25 sneaky, but I think you are entitled to have more information.

1                   MR. FALCONE: If that's what they want to plead, I  
2 think they should be required to plead it and we'll see if they  
3 can.

4                   THE COURT: Okay.

5                   MR. FALCONE: But there is no allegation against  
6 any of the other defendants that would trigger the public  
7 policy exception to the enforceability of 11(b). That's the  
8 main point I wanted to make.

9                   For the same reason, Your Honor, on equitable  
10 subordination there is no inequitable conduct alleged against  
11 Merrill or any of the investors other than Appaloosa. There's  
12 absolutely no factual basis for that claim in the complaint.

13                  MR. FALCONE: As for adequacy, as for the adequacy  
14 of the plaintiff's remedy of money, Your Honor, Delphi has  
15 argued that it is a unique asset and it has used that argument  
16 to invoke this regime of specific performance which primarily  
17 applies, not exclusively, in real estate which is truly a  
18 unique asset.

19                  But I would submit to Your Honor that the question  
20 here is not whether the company is a unique asset. The  
21 question here is whether the money that they were going to get  
22 is a unique asset.

23                  The cases they cite from the New York Court of  
24 Appeals like Butler and Ronnel [Ph.] are cases in which a  
25 plaintiff was trying to compel the sale of stock to the

1 plaintiff. The plaintiff wanted the stock and the Court said  
2 the stock is a unique asset, and moreover, the Court made very  
3 clear in those cases that stock for which there was a market,  
4 stock that is going to be publicly traded is not a unique  
5 asset.

6 You could only get specific performance of stock -  
7 - even if the tables were reversed and the claim here was for  
8 specific performance for the sale of stock, this stock probably  
9 wouldn't even qualify under New York law as a unique asset.  
10 The cases are about stock in closely held corporations for  
11 which there is no market and there's no way to put a value on  
12 that stock. But my understanding, Your Honor, is that this is  
13 going to be publicly traded stock.

14 THE COURT: I guess I'm focusing on something a  
15 little different, which is that this transaction, and I will  
16 focus on the transactions, as opposed to on Delphi, although  
17 I'll note Justice Friedman's [Ph.] opinion cited in the  
18 debtor's papers. But focusing on this transaction, it does  
19 seem to me to be unique.

20 First, it wasn't just the payment of money. It  
21 was to be a plan sponsor which included the best efforts  
22 obligation in connection with fulfilling the entire plan. It  
23 involved being able to designate the new, not all of them, but  
24 new board members. It was integrated in a minutely negotiated  
25 plan that provided for specific distributions to all of

1 Delphi's creditors and interest holders that were premised upon  
2 this particular investment, including a rights offering.

3 They allege that no one else will step into that  
4 gap that the investors were fulfilling. To me, that seems to  
5 be something that would certainly survive a motion to dismiss.  
6 It's not just a normal commercial transaction where someone was  
7 just paying money. It's in the context of a plan that  
8 distributes out stock and rights, as well as cash, but mostly  
9 stock and rights. To say that you could just satisfy that with  
10 a damages claim seems to me to be a real stretch.

11 MR. FALCONE: Well, Your Honor, the background  
12 principle in a contract breach is that a defendant has a duty  
13 to cover if possible and to mitigate if possible. Delphi has  
14 alleged that it cannot replicate this particular deal but  
15 Delphi has not alleged that it can't emerge from bankruptcy  
16 under a modified plan. On the contrary. Delphi has indicated  
17 that if it doesn't get specific performance in this case its  
18 damages will include the costs and --

19 THE COURT: But how would you ever quantify what  
20 the difference was in terms of the rights offered up to the  
21 stockholders -- existing stockholders -- and the creditors  
22 under this plan from some future plan? I mean it's much harder  
23 to me than quantifying what the damages would be for failure to  
24 close on an office building. Judges value office buildings  
25 every day and notwithstanding that the courts say that it's a

1 unique asset. Well, to value the difference between -- how  
2 many classes were in Delphi's -- were in this plan? Many  
3 classes, and each of their recoveries versus what -- however  
4 many recoveries are into some future plan seems to me to be  
5 very, very difficult doing. That's why you have distressed  
6 investors looking at their trades every day. They're betting  
7 on that and there's such big spreads in it because it's so hard  
8 to do, much harder than valuing an office building.

9 MR. FALCONE: Well, I think, Your Honor that under  
10 the EPCA the defendant's contractual liability was to Delphi  
11 and the question I believe the focus of the damages inquiry  
12 would be what was the damage to Delphi, what has it cost Delphi  
13 to not have this transaction but to have another transaction.

14 THE COURT: Right. It doesn't have this plan.

15 MR. FALCONE: But those kinds of issues, Your  
16 Honor, are quite common in front of the courts. Every time  
17 there's a claim in a court that somebody acquired a company and  
18 over leveraged it and paid too much and breached their  
19 fiduciary duties the court has to make a finding as to what the  
20 value of the company was and how it compared to what was paid  
21 for the company and whether -- and there was a breach of --  
22 those kinds of cases are legion to my dismay but they are.  
23 I've litigated those cases and I'm sure they've been litigated  
24 in this courtroom. Determining the value of an enterprise,  
25 determining the economic harm that an enterprise has suffered

1 as a result of a transfer of cash or not receiving a transfer  
2 of cash, that is not an unusual issue for a court to address.

3                   So I would submit, Your Honor, that Delphi should  
4 not be relieved of its duty to mitigate. It should not be  
5 relieved of its duty to cover. It has not alleged that it  
6 can't cover. It has alleged expressly in its complaint that if  
7 it doesn't get specific performance it will have to emerge  
8 under a modified plan and it has specifically identified  
9 economic costs associated with doing that and those costs are  
10 compensable through a damages remedy and whatever harm has been  
11 done to Delphi as a result of not seeing this cash doesn't --  
12 it really genuinely seems to me does not present an  
13 extraordinary issue for courts in this day.

14                   THE COURT: I don't understand the connection on  
15 your point about covering. Even someone who's entitled to a  
16 specific performance will try to mitigate damages. They'll try  
17 to cover but that doesn't mean that that specific performance  
18 wouldn't lie.

19                   MR. FALCONE: The cases on which Delphi relies in  
20 which specific performance is awarded are cases in which the  
21 court concluded that attempts to cover would be futile.

22                   THE COURT: But --

23                   MR. FALCONE: The courts expressly address that  
24 relationship that the damages --

25                   THE COURT: You can always buy another building.

1 It's not the same building but you can always buy another  
2 building or sell another -- sell your building to someone else.  
3 I just --

4 MR. FALCONE: No, Your Honor. These are cases that  
5 are cited where if the defendant is developing a shopping mall  
6 doesn't get a loan another lender is going to foreclose. There  
7 are cases in which the plaintiff has pleaded I have negotiated  
8 with five separate lenders and nobody will lend her the money  
9 and the business is going to go under. There are cases in  
10 which the court is looking at the situation and saying this  
11 shopping mall is a financial failure and cannot -- and nobody  
12 will lend it money and it's going to fold. There's been no  
13 similar allegation like that by Delphi. All they've said is we  
14 may have to do another deal in lieu of this one and that's just  
15 cover.

16 THE COURT: You're saying that it's all or nothing?

17 MR. FALCONE: I'm not sure I understand the  
18 question.

19 THE COURT: You're saying that specific performance  
20 won't lie unless the plaintiff will disappear?

21 MR. FALCONE: I'm saying specific performance won't  
22 lie as long as there is another deal that can be done that will  
23 get in this case -- in this case the issue is not buying a  
24 house. In this case the issue is getting the debtor out of  
25 bankruptcy. That's the objective and as long as there is

1 another plan that can be done, another deal that can be done  
2 that will get the debtor out of bankruptcy and into full  
3 operations then the debtor should be required to pursue that  
4 deal and unless the debtor can say there can never be such a  
5 deal and we're going to have to liquidate then they should make  
6 the deal, they should cover, and then we can talk about a  
7 contract measure of damages.

8 THE COURT: I haven't even gotten to Justice  
9 Friedman's case. What do you have to say on that one?

10 MR. FALCONE: I'm sorry. Which is Justice  
11 Friedman's case, Your Honor?

12 THE COURT: Well, it's the Clear Channel case but  
13 it's the --

14 MR. FALCONE: Oh, the Clear Channel case. But  
15 there, Your Honor, the plaintiff was trying to buy a unique  
16 asset and the plaintiff sought an order. This is the same in  
17 the stock cases and it's actually the same in the real estate  
18 cases. It's the reverse of this case. In those cases you have  
19 a plaintiff who wants to acquire a unique asset and the --

20 THE COURT: How unique is Clear Channel? I mean  
21 there are other companies somewhat like Clear Channel, just as  
22 much as somewhat like this plan as some other plan that Delphi  
23 would do down the road. Why couldn't the plaintiff go out and  
24 buy some other business that's like Clear Channel?

25 MR. FALCONE: But the premise of the decision in

1 Clear Channel, Your Honor, is that the court concluded that  
2 Clear Channel was a unique asset just as Delphi is claiming  
3 that it is a unique asset. Delphi has now said in its pleading  
4 the reorganized Delphi is a unique asset. There are other  
5 auto-parts companies.

6 THE COURT: Well, but that didn't -- I guess you're  
7 just disagreeing with the logic of her opinion then.

8 MR. FALCONE: With the logic of?

9 THE COURT: Of that opinion then.

10 MR. FALCONE: No. I think given what the court --  
11 given the court's conclusion in that opinion that Clear Channel  
12 is a unique asset, that the financing that the plaintiff  
13 required the financing to acquire that unique asset. It's  
14 actually very similar, Your Honor, to I think it was the  
15 Bergmann case where the court enforced the loan because the  
16 loan was part of a contract of sale for real estate and the  
17 court said this is really a transaction about acquiring a  
18 unique asset, about acquiring a piece of real estate. In my  
19 mind, Your Honor, that is of a piece with Clear Channel but the  
20 case -- but the order, the specific performance has to be an  
21 order compelling somebody to sell that unique asset to you.  
22 Money is not a unique asset and that's all that Delphi seeks  
23 here. Delphi is not seeking to acquire its -- Delphi has not  
24 alleged that the money was being lent specifically for the  
25 purpose of it to go out and buy a piece of property or a race

1 horse or a unique company. There's no connection to any unique  
2 asset from Delphi's point of view here. It's just cash.

3 THE COURT: Well, I guess what you're saying there  
4 is that the difference is that one is a purchase and the other  
5 is a sale?

6 MR. FALCONE: I believe that's one difference, Your  
7 Honor, yes.

8 THE COURT: But --

9 MR. FALCONE: And the --

10 THE COURT: Even though you may not be able to  
11 purchase -- you may not be able to persuade someone to have you  
12 buy -- just to sell you the exact equivalent of Clear Channel.  
13 There's always a seller out there somewhere that you can buy  
14 something close to Clear Channel; right?

15 MR. FALCONE: But, Your Honor, I think if the court  
16 in Clear Channel had accepted that view it couldn't have ruled  
17 the way it did.

18 THE COURT: Well, but it's --

19 MR. FALCONE: If we're going to take Clear Channel  
20 as authority I think we have to accept the premises of the  
21 decision.

22 THE COURT: But then why isn't it the same  
23 allegation as far as a motion to dismiss applicable here? Why  
24 isn't Delphi in the context of the plan that was negotiated  
25 with all of its moveable parts aligned on April 4<sup>th</sup> as unique as

1 by analogy Clear Channel is.

2 MR. FALCONE: Delphi may be unique but Delphi isn't  
3 seeking --

4 THE COURT: No, no. I'm saying the plan was as  
5 unique if not more so because it required all of the moving  
6 parts to get in place, which they detail at length in the  
7 complaint.

8 MR. FALCONE: But the cases talk about the subject  
9 matter of the contract that somebody is trying to acquire.

10 THE COURT: The contract in theory incorporates the  
11 whole magilla. It has the whole deal in it.

12 MR. FALCONE: Even so, Your Honor, it's still cash.  
13 The provision in the contract that entitles any group of the  
14 investors to appoint a board director, that's a benefit for the  
15 investors because they're buying so much stock in this company.

16 THE COURT: You think so?

17 MR. FALCONE: I --

18 THE COURT: Sponsors don't have any real -- well, I  
19 guess we've learned that; right? Most people when they make a  
20 deal, they have a sponsor for their plan and assume that the  
21 sponsor is going to do something good for the company. It's  
22 not a one-way street. We've learned our lesson here.

23 MR. FALCONE: I would submit, Your Honor, that most  
24 investors get directors on the boards because they bargain for  
25 that.

1                   THE COURT: And most debtors agree to it because  
2 they want to have someone nominated by Merrill Lynch on the  
3 board because that looks good to their investors too.

4                   MR. FALCONE: I accept that, Your Honor, but --

5                   THE COURT: And they bargain to have, as I said  
6 repeatedly at the hearings, the biggest investment banks in the  
7 country in the deal as a measure of confidence in the deal,  
8 particularly when they're covenanting to use their best efforts  
9 to make the entire transaction happen, all of the transaction,  
10 including, one would have thought, helping to facilitate the  
11 financing instead of trash talking it, which is alleged here as  
12 far as Appaloosa is concerned. But maybe that's neither here  
13 nor there but I do believe that this on its face, since it  
14 gives the investors the right to review every scrap of paper  
15 with regard to the plan, the rights offering, you name it, and  
16 to provide their input on it, that this is very clearly more  
17 than just an acquisition of some stock. This is an entire  
18 transaction premised upon an emergence from bankruptcy. As Mr.  
19 Tepper characterized it in his testimony, they want to get  
20 Delphi out of bankruptcy.

21                   MR. FALCONE: And Delphi, I think everybody in this  
22 room believes, can still get out of bankruptcy and if it has  
23 suffered damages as a result of having to do another deal  
24 rather than this deal then those damages should be measured,  
25 but the complexity of measuring them, Your Honor, I would

1 submit frankly is limited by the damages cap.

2 THE COURT: I don't see how that would be any  
3 more -- any less complex than measuring the damages of not  
4 being able to buy Clear Channel. Sure, judges can make their  
5 best shot at those sorts of things and we do sometimes, but to  
6 me that doesn't rule out specific performance.

7 MR. FALCONE: I guess all I'm suggesting, Your  
8 Honor, is that given the existence of the damages cap we know  
9 what the range is going to be between the top number and the  
10 bottom number and that was not the case in Clear Channel and  
11 that frankly was not the case in any of the other cases that  
12 have been cited here.

13 THE COURT: Well, that was a nice switch of topics.

14 MR. FALCONE: Unless you have any more questions,  
15 Your Honor, I'm done.

16 THE COURT: Thank you.

17 MR. FALCONE: Thank you.

18 [Pause in proceedings.]

19 MR. ROSENTHAL: Good afternoon now, Your Honor.  
20 Jeff Rosenthal, Cleary Gottlieb on behalf of UBS.

21 The one issue that I'd like to address today is  
22 that the record cognizable before this Court already  
23 establishes grounds for the breach of contract claim and the  
24 specific question that I'm looking to address is did Delphi  
25 violate the EPCA [2:14:25] condition through any "Alternate

1 Transaction Agreement." Well, the defined term uses the word  
2 "agreement," Your Honor. The actual definition in the EPCA is  
3 much broader and it includes as the Court knows the word  
4 "proposal." The defined term, Your Honor, is in Section  
5 9(a)(5) of the EPCA and it says "the company shall not have,"  
6 and then it says "taken any action to seek any bankruptcy court  
7 approval relating to any Alternate Transaction." For the  
8 purposes of this agreement, an alternate transaction means any  
9 plan, proposal, offer or transaction that is inconsistent with  
10 this agreement, the preferred term sheet, the GM settlement or  
11 the plan other than a Chapter 7.

12 So there are really three elements, Your Honor,  
13 that need to be satisfied for the alternate transaction  
14 definition, all of which we submit are part of the  
15 incontrovertible record. One is a proposal; two is that it's  
16 inconsistent with the EPCA; and three is that it's for which  
17 Delphi sought any approval of this Court. If all three of  
18 those elements are satisfied, then by definition there's an  
19 Alternate Transaction and then ADAH had a right of termination  
20 and this specific performance remedy really becomes a moot  
21 issue. I'd like to spend a moment focusing on these three  
22 individual elements.

23 With regard to a proposal, Your Honor, we believe  
24 there's no dispute here. Delphi delivered back in February of  
25 2008 to the plan investors a "summary of revised terms to

1 provide for enhanced participation by GM in Delphi's existing  
2 financing." That's at Exhibit 9 to the Cohen declaration filed  
3 by ADAH. Then when Delphi, Your Honor, presented it to this  
4 Court in its 1142 motion even they defined it as the proposal.  
5 That's at Paragraph 26.

6 THE COURT: Have you read the transcript of that  
7 hearing?

8 MR. ROSENTHAL: Not only that, Your Honor, I was at  
9 that hearing.

10 THE COURT: Okay. You know what I ruled at that  
11 hearing.

12 MR. ROSENTHAL: Yes, Your Honor. I was going to  
13 get to that element in a moment, Your Honor, and just take  
14 these elements one by one. I'm happy to jump ahead to the  
15 other two elements.

16 THE COURT: Okay.

17 MR. ROSENTHAL: So as to simply the question of  
18 whether there was a "proposal," there was a proposal that was  
19 both presented to the plan investors and defined as a proposal  
20 in Delphi's 1142 motion.

21 The next question, Your Honor, is was it  
22 inconsistent with the outcome. Section 5(p)(ii) of the EPCA,  
23 whether the Court ruled on it back in March or not, it's  
24 something that based on incontrovertible facts before this  
25 Court it's capable of disposition right now. In Section

1 5(p)(ii) of the EPCA it says, among other things, "the company  
2 shall not enter into any other agreement with GM that is  
3 outside the ordinary course of business." As the Court knows  
4 and the parties do have a debate as to the degree to which the  
5 Court ruled and I'm not going to tell Your Honor what you meant  
6 by it, but on Page 127 the Court said "It also appears to me  
7 that the incurrence of up to almost \$2 billion of additional  
8 notes, more than \$750 million originally contemplated to GM  
9 would be outside the ordinary course of the debtor's business  
10 which is precluded by Paragraph 5(p)(ii) of the EPCA.

11                   But even had the Court not made any statement at  
12 all on that issue, we have before the Court in the record what  
13 that proposal was and we have the unambiguous terms of the EPCA  
14 and therefore on a motion to dismiss this Court can render a  
15 definitive conclusion now without requiring millions of dollars  
16 of discovery for the case to go on to decide whether that  
17 proposal was consistent or inconsistent with the EPCA.

18                   We finally have then, Your Honor, to the extent  
19 that there's a proposal that on its face is inconsistent with  
20 the EPCA the only other question is did the debtors seek any  
21 approval of this Court of that proposal. Delphi says in its  
22 opposition that it just sought guidance from the Court,  
23 whatever that may purport to be. But that guidance involved to  
24 use Delphi's own words in the 1142 motion and in oral argument  
25 "determining that the debtor's proposed exit financing is

1 compliant with the plan inclusive of the EPCA" finding that the  
2 terms of the debtor's proposed exit financing comply with the  
3 plan in the EPCA. To the extent that there's any doubt, Your  
4 Honor, we could look at the proposed order that was filed by  
5 Delphi in connection with the 1142 motion that they asked the  
6 Court to sign. In fact, that very much tracks some of the  
7 language in the EPCA. They asked you to conclude that the  
8 terms -- to make a ruling the terms of the debtor's proposed  
9 exit -- the proposed exit financing comply with the plan in the  
10 EPCA. That, Your Honor, is as we put in our brief the very  
11 definition of approval which includes favorable opinion,  
12 confirm, to have or express a favorable opinion of, to confirm  
13 authoritatively, and at Page 5 of UBS' reply brief we cite  
14 three leading dictionaries which all have those definitions,  
15 Oxford, Black's and Webster's, and I would note that to insure  
16 that it's broadly construed the parties in the alternate  
17 transaction definition of the EPCA used the phrase any  
18 approval.

19 So not only did Delphi, Your Honor, seek approval  
20 of the proposal that was inconsistent with the EPCA, but they  
21 affirmatively -- and this is in the next paragraph, Paragraph 3  
22 of the proposed order, they sought to direct the plan  
23 investors, for the Court to enter into an order directing the  
24 plan investors to use their reasonable best efforts to support  
25 the confirmation of that exit financing.

1                   Your Honor, the debtors knew what the restrictions  
2 of the EPCA were and while there's nothing wrong with them  
3 taking simply a proposal or even a proposal that's inconsistent  
4 with the EPCA given that there's three elements needed and  
5 trying to persuade the plan investors we need to do this, will  
6 you consider it, and trying to do it through negotiation and  
7 then pursuing an alternate avenue if the plan investors reject  
8 that, they knew and they made an informed decision that if they  
9 sought that third element which was to seek a favorable opinion  
10 of this Court with regard to that proposal, that the risk that  
11 they ran was that if that proposal was inconsistent with the  
12 EPCA --

13                   THE COURT: Even if they reasonably believed, as I  
14 believe was the case, the plan investors were in breach?

15                   MR. ROSENTHAL: Yes, Your Honor. In fact --

16                   THE COURT: Yes? You don't think the plan  
17 investors had any obligation, that they had bound them to that  
18 obligation?

19                   MR. ROSENTHAL: I think even if they reasonably  
20 believed that that was compliant, Your Honor, the -- I have  
21 really two responses. One is that's not the language that's  
22 used in Section 9(a)(5) but the other thing is you had an  
23 interesting colloquy back on March 7<sup>th</sup> with Mr. Lauria in which  
24 Mr. Lauria proposed the question in reverse to you. He said to  
25 the Court "Would we, the plan investors, be in violation" --

1 I'm reading from Pages 101 to 102 of the transcript, Your  
2 Honor.

3 He said to you "Would we, the plan investors, be  
4 in violation if we reasonably believed that this was not  
5 compliant and yet we opposed it until we received a ruling from  
6 the Court." The Court instructed Mr. Lauria that essentially  
7 well, if the contract is unambiguous, that it was consistent  
8 with the EPCA well, then you've answered your own question. I  
9 think the same thing holds true here. If the contract is  
10 unambiguous, the GM proposal, and it is unambiguous, it cannot  
11 submit to the Court for approval --

12 THE COURT: I didn't find that. I said there  
13 needed to be evidence on the issue.

14 MR. ROSENTHAL: Your Honor, I'm reading on Page  
15 102. I'm looking at Line 5. "If you're in breach of the clear  
16 terms of the document then it seems to me that issue is  
17 answered." If you --

18 THE COURT: Yes, it seems to me but I go on to say  
19 it isn't.

20 MR. ROSENTHAL: I agree, Your Honor, but the  
21 question there was are you in violation of the reasonable best  
22 efforts clause. So it's possible after a factual inquiry that  
23 you would find that the debtors have violated the reasonable  
24 best efforts clause. But is there a violation of 9(a)(5), the  
25 alternate transaction clause because of a subjective belief

1 that was wrong? There's no language in 9(a)(5) that creates an  
2 exception.

3 THE COURT: This argument, unlike -- despite some  
4 of my -- the response to the other arguments -- really turns my  
5 head. Let's leave aside for a second that everyone who  
6 practices bankruptcy law knows what "alternative transaction"  
7 means and that no bankruptcy judge, this one included, would  
8 authorize a breakup fee of \$82.5 million unless the debtor was  
9 proposing something that involved what we all know to be an  
10 alternative transaction. As I said repeatedly at the hearing,  
11 which you attended, that's not what the debtors were doing.  
12 What the debtors were doing was seeking a determination that  
13 the plan investors are in breach.

14 MR. ROSENTHAL: But by not supporting the proposal  
15 that was inconsistent with the EPCA.

16 THE COURT: Right. And, you know what, there was  
17 a very good argument that they were in breach.

18 MR. ROSENTHAL: Your Honor --

19 THE COURT: And in fact, I told the debtors that  
20 if they did a little tweak and the plan investors,  
21 nevertheless, continued to take the position they were taking --  
22 and that's even before what's alleged in this complaint --  
23 the plan investors would be in breach. It seemed to me -- and  
24 I said this -- the debtors were acting reasonably and properly  
25 in seeking that relief rather than playing along with the

1 investors' "Got ya" game over holding them to what you're  
2 suggesting. You know, it just doesn't make any sense.

3 MR. ROSENTHAL: Your Honor, if I could explain the  
4 logic behind this --

5 THE COURT: It's beautifully logical. Just  
6 beautifully logical. It just doesn't make any sense.

7 MR. ROSENTHAL: Your Honor, it was important --  
8 there was a four month period or three month period in fact  
9 from December 2007 until the original termination date of March  
10 31, 2008 to get this deal done. Therefore, it was critical to  
11 all the parties to focus their efforts on this deal and get it  
12 done for six weeks.

13 THE COURT: You know what, that was at issue and  
14 in fact what the debtors were proposing was the same dollar  
15 amount but less cash coming out of the company. So it would  
16 seem to me but for the drafting of their document, which did  
17 put in GM, they were acting totally appropriately and the only  
18 issue was, consistent with the parties' obligations expressly  
19 in the contract to deal with each other with their best efforts  
20 and their unwritten obligations to deal with each other in good  
21 faith and fair dealing, whether Delphi could win in terms of  
22 the papers on that point. Now, I said, no, there had to be an  
23 evidentiary hearing and your colleagues all showed up and said  
24 that you can't do this on this basis you need evidence. So I  
25 said fine. Meanwhile, you all should understand that I won't

1 need evidence if in fact it's done by a GM subsidiary. Period.

2                   How you could equate that into a breach and treat  
3 it as an \$82.5 million termination fee is beyond me and I  
4 think, sir, it's beyond you.

5                   MR. ROSENTHAL: Your Honor, it's the words of the  
6 contract, it's what the parties agreed to.

7                   THE COURT: Well, the words of the contract also  
8 include a "best efforts obligation" and implicit in the  
9 contract under New York law is good faith and fair dealing, and  
10 what you and your colleagues were trying to do to this debtor  
11 over this issue, it's pretty clear to me, was not consistent  
12 with those obligations.

13                  MR. ROSENTHAL: Your Honor, we didn't brief the  
14 issue but I'm confident there's a lot of New York law that when  
15 you abide by the terms of the contract and you insist on strict  
16 performance of the contract it's not a breach of good faith or  
17 --

18                  THE COURT: You were doing more than that because  
19 you were proposing that the debtor was in breach in what they  
20 were proposing and you were holding them up even though it was  
21 a clear issue as to whether in fact it wasn't the debtor that  
22 was in breach but your clients.

23                  MR. ROSENTHAL: I don't have anything more to add  
24 on the subject. Thank you.

25                  THE COURT: I will note that I specifically held

1 "it is appropriate for the debtors to have requested such  
2 relief which was to seek a ruling as to whether the plan  
3 investors are properly honoring their agreement under Paragraph  
4 6(d) of the EPCA." Frankly, although it would require an  
5 evidentiary hearing I have very serious doubts whether they  
6 were.

7 MR. KIRSHBAUM: Moving right along, Your Honor.  
8 Myron Kirshbaum from Kaye, Scholer representing the two  
9 Harbinger defendants; Harbinger Del-Auto and its parent  
10 company, Harbinger Capital.

11 Your Honor, the issue I'd like to address briefly  
12 -- the Harbinger/Pardus brief goes into it in quite a bit of  
13 detail -- but I'd like to address the piercing of the corporate  
14 veil and the issue of whether or not, assuming as I believe it  
15 has been established that the committal letters themselves are  
16 clear and do not permit specific performance by virtue of the  
17 very specific limitation to monetary damages only, whether or  
18 not Delphi's alternative theory, which is piercing the  
19 corporate veil, works, and I'd like to argue basically two  
20 points which were in the briefs but which, I believe, are  
21 dispositive and under either of them we believe that the  
22 piercing theory fails to state a claim here.

23 One is the Brunswick case, which if I'm not  
24 mistaken the Delphi brief does not even cite in its response.  
25 The Brunswick case in the Second Circuit --

1                   THE COURT: Let me cut you short. I understand  
2 your argument on that case and I accept it with one caveat, and  
3 one of you -- I think Mr. Shore -- said he would show me  
4 something on this -- I don't see in the record anything that I  
5 could look to on the motion to dismiss basis to show that in  
6 fact the Pardus and Harbinger investors as opposed to the  
7 parent companies were actually -- you know, assetless and  
8 unable to perform, etc. I know they say they were "shells."  
9 I'm not sure that's sufficient.

10                  As I read Brunswick it applies in a situation  
11 where the parties seeking to pierce the corporate veil knew  
12 that they were dealing with the real party-in-interest as --  
13 that in fact the relationship between the parent and sub was  
14 clear to them -- and that makes sense to me -- but it's not  
15 clear to me that in the record that's before me, which is,  
16 again, on a motion to dismiss basis that that's not the case in  
17 all cases. You sometimes get parent funding agreements just as  
18 a back-up or to do some of it, not all of it.

19                  MR. KIRSHBAUM: Your Honor, I think Delphi's  
20 opposition actually takes care of that issue. On Page 42 of  
21 its opposition papers, Delphi states --

22                  THE COURT: Well, but that's -- okay, go ahead.

23                  MR. KIRSHBAUM: Well, it states that it knew that  
24 the assets of ADAH, Harbinger Del-Auto and Pardus DPH Holding  
25 were limited to the commitments of their respective parent

1 corporations and those commitments in turn are defined in  
2 Paragraph Section 40 of the EPCA. So they knew --

3 THE COURT: Okay. So the debtors should address  
4 that point? All right.

5 MR. KIRSHBAUM: I guess they'll have to.

6 THE COURT: Okay.

7 MR. KIRSHBAUM: Your Honor, then if that's the  
8 case I'll just move along. I think the Brunswick point is  
9 dispositive and establishes lack of piercing the corporate veil  
10 and nothing else really needs to be said with Brunswick  
11 applicable. But in addition, we brief this at some length, New  
12 York law now -- whatever it might have been in 1972 or at some  
13 other point, New York law is now very clear that piercing the  
14 corporate veil requires the satisfaction of two prongs; one is  
15 domination by the parent company and the normal piercing kinds  
16 of issues and the second thing is the use of the corporate form  
17 or misuse of the corporate form to perpetrate a fraud or wrong  
18 and with that additional clarity in New York law which has come  
19 about, I would say, within the last ten years but it's now very  
20 clear both at the federal and state level, it's clear here that  
21 just the fact that there was a parent company and a sub and the  
22 sub was dominated by the parent and breached the contract that  
23 can't add up to what you need for piercing. What you need for  
24 piercing -- Judge Roker deals with it in the Ticket Planet case  
25 and other cases -- is showing that the parent syphoned assets

1 out of the sub to make it impossible for the sub to perform,  
2 moved money around and in fact engaged in a "shell game" as the  
3 cases refer to it to take money from one place to another --

4 THE COURT: Well, you need a fraud or wrong by the  
5 parent --

6 MR. KIRSHBAUM: Yes, you need a fraud or wrong.

7 THE COURT: -- in its domination of the sub.

8 MR. KIRSHBAUM: That's right and the fraud or  
9 wrong is not just a breach of contract, Your Honor.

10 THE COURT: I guess the issue I have there and  
11 it's, frankly -- although the debtors can respond to this -- I  
12 don't think it's an issue with Harbinger and Pardus as the  
13 complaint currently lies but it is an issue, I think, with  
14 Appaloosa, is that other aspects of the complaint, to me, do  
15 allege that Appaloosa was doing stuff itself in the case on  
16 behalf of the investor and, you know, you may be great friends  
17 with Mr. Shore; I might ask you to carry his oar though on  
18 this, but --

19 MR. KIRSHBAUM: I would just point out that the  
20 way I read these cases -- and the Ticket Planet case being one  
21 -- it wouldn't be enough even for Appaloosa to have done the  
22 things that are alleged and even if the conclusions of those  
23 are frauds or wrongs it still wouldn't be enough because that  
24 had nothing to do with the corporate structure here.

25 THE COURT: Well, except it was the investor that

1 was supposed to be under the contract dealing with, for  
2 example, the "additional investors" and to allege that  
3 Appaloosa was doing that and that that was all under the  
4 control of Mr. Tepper and they were all -- you know, they were  
5 concerting this strategy, not little, undercapitalized ADAH.

6 MR. KIRSHBAUM: I would suggest that wouldn't be a  
7 piercing theory that would be a tort theory against Appaloosa  
8 if it existed but at that time --

9 THE COURT: Well, it would seem to me that it  
10 would be truly inequitable to let Appaloosa off of the hook for  
11 something like that -- and, again, this is just in a motion to  
12 dismiss context -- on the theory that it had capped its  
13 liability under the funding agreement and, of course, ADAH  
14 wouldn't have anything to pay under this theory. So in that  
15 sense it would seem to me that you could satisfy the New York  
16 requirements for veil piercing but, anyway, most of what you've  
17 said is really for the debtors to respond to, I think.

18 MR. KIRSHBAUM: Okay. The final thing I'd just  
19 like to point out is an equitable subrogation -- equitable  
20 subordination -- again --

21 THE COURT: It's really the same point; right?  
22 There's no wrongdoing --

23 MR. KIRSHBAUM: There's no wrongdoing --

24 THE COURT: It's what Mr. Shore said.

25 MR. KIRSHBAUM: That coupled with the fact that

1 under the -- the additional wrinkle is that the claims that  
2 would be subordinated if there were going to be subordination  
3 would be at the parent company level. The parent company isn't  
4 charged with doing a wrong but even if it were there's a  
5 limitation of remedies in the letter agreement to monetary  
6 damages only.

7 THE COURT: Well, that's an interesting issue --  
8 whether equitable subordination is a monetary damage or not.  
9 You certainly don't get paid --

10 MR. KIRSHBAUM: I would argue it's equitable, Your  
11 Honor, and --

12 THE COURT: Well, is that in the papers? I didn't  
13 see that issue.

14 MR. KIRSHBAUM: Yes, it is. It's in the Harbinger  
15 part of --

16 THE COURT: Is there a case that says that  
17 equitable subordination doesn't -- no, there couldn't be.

18 MR. KIRSHBAUM: I don't believe we cited a case  
19 but I don't think it would be hard to find a case that says  
20 that equitable subordination is an equitable remedy.

21 THE COURT: Well, but that's different than  
22 monetary damages.

23 MR. KIRSHBAUM: Well, the commitment letter said  
24 monetary damages only.

25 THE COURT: Right. You don't get money.

1                   MR. KIRSHBAUM: That's what I'm saying.

2                   THE COURT: If you're equitably subordinated you  
3 wouldn't get money.

4                   MR. KIRSHBAUM: That's not monetary damages  
5 though, that's an equitable subordination.

6                   THE COURT: All right. Okay.

7                   MR. KIRSHBAUM: It is in the brief though, Your  
8 Honor.

9                   THE COURT: All right.

10                  MR. KIRSHBAUM: Thank you.

11                  THE COURT: Okay. The defendants are done subject  
12 to rebuttal. Is that correct?

13                  MR. LACEY: No, Your Honor. Goldman Sachs would  
14 like to say something.

15                  THE COURT: Okay.

16                  MR. LACEY: Your Honor, I don't know if you've  
17 ever climbed a mountain or gone for a long hike, but there  
18 comes a point when you do that and you can no longer hear the  
19 noise from the highway and you've gotten out and it's quiet and  
20 we've gotten to this stage of this argument.

21                  I'm Rob Lacey from Sullivan & Cromwell. I'm  
22 speaking on behalf of Goldman Sachs which made the decision  
23 back before the EPCA amendment was approved to stay out of the  
24 fray, and it has been trying to stay out of the fray ever since  
25 and Delphi recognizes that it has stayed out of the fray and

1 the other investors recognize that it has stayed out of the  
2 fray and the result is that apart from the allegation that  
3 Goldman Sachs was a party -- was an investor under the EPCA and  
4 the allegation that it didn't fund, there are no allegations in  
5 the complaint about Goldman Sachs. Even the allegations that  
6 are done on a sort of group basis concerning other investors  
7 specifically exclude Goldman Sachs because they all relate to a  
8 common interest agreement that Goldman Sachs didn't sign or  
9 letters that were written on behalf of the other investors  
10 which exclude Goldman Sachs because Goldman Sachs wasn't  
11 talking to the other investors.

12 So, Section 12(a)(1) of the EPCA which is the one  
13 that creates the obligation to buy shares says that the  
14 obligation is assumed severally and not jointly. This is an  
15 agreement that creates a separate obligation by each of the  
16 investors to buy shares, not a joint application. Section  
17 9(a)(xvii) says that each party's obligations are conditioned  
18 on all the other parties' obligations -- all the other parties'  
19 performance of their obligations. We said in our opening brief  
20 that you can tell from the complaint that either Delphi or ADAH  
21 had breached their obligations prior to the time when the  
22 closing was supposed to occur so Goldman Sachs had no  
23 obligation to close and it didn't breach the agreement and  
24 Delphi has not disagreed with any part of that analysis. It is  
25 agreed, Delphi does not dispute that Goldman Sachs' obligations

1 were conditioned on performance by everybody else, and it does  
2 not dispute that as of early on the morning of April 4th  
3 somebody else had breached the agreement. So the opposition to  
4 the Goldman Sachs' motion has only got two points in it which  
5 raise matters which are not in the complaint, and that's really  
6 all I need to talk about.

7                   The first is it says, ah, but we assert that  
8 Goldman Sachs acted in concert with the other defendants.  
9 Well, there are two problems with that argument; the first is  
10 that's not in the complaint. They cite Paragraphs 44 and 45 of  
11 the complaint as their allegations of action in concert. Your  
12 Honor, I presume you have a copy of the complaint up there  
13 somewhere?

14                   THE COURT: Yes.

15                   MR. LACEY: Well, if you turn to Paragraphs 44 and  
16 45 you will see that these are descriptions of the investment  
17 agreement; they don't say anything about Goldman Sachs, they  
18 don't say anything about acting in concert. In fact, all of  
19 the allegations concerning behavior of the investors consists  
20 of allegations about dealings between Appaloosa and the  
21 "additional investors" -- Goldman Sachs is not an additional  
22 investor, those additional investors are not parties to this  
23 case -- and the back and forth which eventually led to the  
24 Section 1142 motion in March. Goldman Sachs was not part of  
25 that and Delphi knows it's part of that because when -- Delphi

1 knows Goldman Sachs was not a part of that because when they  
2 made the 1142 motion they said the term "investors" that's used  
3 in this motion does not include Goldman Sachs when it describes  
4 the conduct that made this motion necessary. We have it  
5 established that that conduct did not involve Goldman Sachs.  
6 Then the complaint has no allegations of any conduct by anybody  
7 between the 1142 hearing and April 4th. So there is clearly --  
8 the other thing they -- the second problem with the "in  
9 concert" argument is, even if they did allege that, there is no  
10 saying that someone has acted in concert with somebody who  
11 breaches a contract doesn't state a claim for which relief can  
12 be granted. There is a theory called tortious interference  
13 with contract where you can be held liable on account of  
14 somebody else's breach, but for the reasons we've explained in  
15 the brief they have not attempted to allege that and they can't  
16 allege that because in New York you have to allege that the  
17 conduct of the person who committed the tortious interference  
18 caused the breach. The other thing they say is that they've  
19 asserted a claim against Goldman Sachs for failing to use  
20 reasonable best efforts. Again, they don't cite anything when  
21 they say that, but as I've just described, all of the conduct  
22 that is actually described prior to April 4th is conduct of  
23 people other than Goldman Sachs, so they quite clearly have not  
24 alleged any failure to exercise reasonable efforts by Goldman  
25 Sachs, and as I say, when they came to court to compel

1 reasonable best efforts they let Goldman Sachs out because  
2 Goldman Sachs hadn't done anything. The other thing, of  
3 course, is sort of a vague -- you can't just sort of wave  
4 reasonable best efforts as a wand to sort of change the  
5 contract.

6 Now, I started out by saying the contract creates  
7 several and not joint obligations to invest and I hope I have  
8 explained why Goldman Sachs doesn't think that it breached its  
9 obligation to invest. The contract does have another provision  
10 in it that says that the investors assume joint and several  
11 liability for one another's willful breach, and Goldman Sachs  
12 is not trying to run away from that. If you find that there is  
13 a litigable issue concerning whether anybody willfully breached  
14 the contract then Goldman Sachs has to stay in pursuant to that  
15 commitment, but that commitment is limited to \$39 million.  
16 That commitment clearly would not support an award of specific  
17 performance against Goldman Sachs and Delphi has never  
18 suggested that it would. So at that point we would be  
19 continuing in our role of what they used to refer to as a  
20 Nantucket sleigh ride where you managed to spear a whale and  
21 get towed along and we will continue to be towed along, but the  
22 loss at the end is going to be limited to \$39 million and will  
23 not include specific performance because there's no breach to  
24 support a claim for specific performance.

25 I have nothing further to say, Your Honor.

1 THE COURT: Okay. Thank you.

2 | That's 11(b)?

3 MR. LACEY: It's 11(b), Your Honor.

4 THE COURT: It's 11(b) and that's separate from  
5 the whole \$250 million point, that's the specific limitations  
6 that are in 11(b) for the named entities?

7 MR. LACEY: That's correct. The 39 is a parceling  
8 out of the \$250 million.

9 THE COURT: But it's a different provision than  
10 the one --

11 MR. LACEY: That's right. It's a subsidiary  
12 provision.

13 THE COURT: Right. Okay. Anyone else from the  
14 movants?

15 | [No response.]

16 THE COURT: Okay. I'm going to take a break for  
17 lunch and be back here at two.

18 [Recess.]

19 THE COURT: Okay. We're back on the record in  
20 Delphi v. Appaloosa, et al. and I guess I'm going to hear now  
21 from Delphi.

22 MR. FRIEDMAN: Good afternoon, Your Honor. May it  
23 please the Court, I am Edward A. Friedman with the firm of  
24 Friedman, Kaplan, Seiler & Adelman representing the plaintiff  
25 Delphi Corporation.

1                   Your Honor, I could start responding to various of  
2 the things that were said by defendants' counsel this morning  
3 that I think need to be responded to. I also understand that  
4 Your Honor has questions that the Court would like me to  
5 address so I'm happy to proceed with anything Your Honor wants  
6 to ask me at this time or I'm happy just to start in my own  
7 order.

8                   THE COURT: Well, not knowing what your order is,  
9 let me just reiterate some points that I want you to address at  
10 some point. If they fit into your order, that's fine, if not,  
11 I just want to remind you of them, and there may be other ones  
12 that you took down and if you did, don't ignore them.

13                   The first point is, just in order of sequence,  
14 responding to the argument that leaving aside the allegations  
15 in Paragraphs 71 through 90 or so about the alleged behind-the-  
16 scenes activity by Appaloosa and other unnamed parties, is  
17 there any other allegation in the complaint that would  
18 independently support a fraud claim against Appaloosa -- and  
19 that would include what if anything can be made of the various  
20 statements under oath in court or in pleadings filed in court  
21 in connection with the transaction?

22                   The second issue is responding to Mr. Shore's  
23 point that on its face Paragraph 11(b) unambiguously limits the  
24 investors or claims against the investors -- the investors'  
25 liability -- to \$250 million in the aggregate even if it

1 doesn't limit specific performance, i.e., it would limit  
2 specific performance to only \$250 million.

3                   The next point would be a general point, which has  
4 been raised by counsel for all the defendants other than  
5 Appaloosa, that there's really nothing in the complaint that  
6 accuses them, as opposed to Appaloosa, of truly culpable,  
7 harmful conduct that would rise to the level of either creating  
8 an equitable subordination claim or the type of conduct that as  
9 a matter of public policy would override a limitation on  
10 liability under Kalisch and the cases that you've cited since  
11 then; and there's, I guess, a related point, which is Mr.  
12 Kirshbaum's point that because of the limitation on liability  
13 in the parent's backstop agreement, i.e., "monetary damages  
14 only," you can't go against the parent companies, particularly  
15 absent any allegations of truly culpable, harmful conduct, to  
16 equitably subordinate their claims.

17                   I think that's it, although I may have mentioned  
18 other things that you shouldn't ignore if you wrote them down,  
19 but those are the ones I was going to ask you.

20                   MR. FRIEDMAN: Well, what I'd like to do, Your  
21 Honor, is address these questions in the order in which you've  
22 presented them and then there may be other things.

23                   THE COURT: Okay.

24                   MR. FRIEDMAN: So, first, the question is do we  
25 have sufficient allegations to support a fraud claim against

1 Appaloosa?

2 THE COURT: Separate and apart from the, going  
3 behind the back to disparage the financing --

4 MR. FRIEDMAN: Exactly.

5 THE COURT: So my focus in addressing that  
6 question would be the allegations in Paragraph 60, 61 and  
7 thereabouts in our complaint which is where we have allegations  
8 about statements by Appaloosa in court and in papers filed with  
9 the Court in both cases. These are statements under oath. We  
10 believe that these representations and assurances by David  
11 Tepper are a sufficient predicate for the fraud claims that we  
12 assert. I would start with the allegations in Paragraph 61 of  
13 the complaint, and there, there are two representations and  
14 assurances set forth; one is the statement by David Tepper in  
15 his affidavit that was submitted to the bankruptcy court in  
16 which Mr. Tepper states, Appaloosa "committed a minimum of \$1.1  
17 billion of its own capital." The second statement by Mr.  
18 Tepper which is quoted in Paragraph 61 of the complaint is Mr.  
19 Tepper's testimony at the hearing on December 6, 2007 when Mr.  
20 Tepper said, "I understand that when I gave my word to somebody  
21 and shake somebody's hand I have a deal. I have a deal.  
22 That's what I understand."

23 THE COURT: Okay. But Mr. Shore's point is, when  
24 he says, I have a deal, I have a deal, you've got to look to  
25 the deal, and if the deal gives you an out then that's what

1 he's referring to.

2 MR. FRIEDMAN: I have sort of two thoughts and  
3 points with respect to that, Your Honor.

4 THE COURT: Okay.

5 MR. FRIEDMAN: The first is the premise for Mr.  
6 Shore's argument is that the contract -- the EPCA -- gave  
7 Appaloosa a right to send a termination notice even if Delphi  
8 complied with all of the conditions and that's the argument  
9 that Appaloosa makes that they had the right to send a notice  
10 on April 4th whether or not Delphi was in breach or in  
11 compliance with all of the conditions. The EPCA does not give  
12 Appaloosa or ADAH the right to send a termination notice under  
13 those circumstances. It does not give ADAH the right to  
14 decline to honor its funding commitment if Delphi complies with  
15 all the conditions applicable to it. What Mr. Shore is  
16 apparently talking about would be jurisprudence that recognizes  
17 as a general matter that parties to a contract may have a right  
18 to breach the contract and pay damages but the idea that you  
19 can plan to breach a contract in that manner when you do not  
20 have a contractual right to do that and assert that as a  
21 defense for a fraud claim is wrong for two reasons. First,  
22 it's wrong because as a matter of fact we have to look at all  
23 the facts and circumstances that were present in November and  
24 December of 2007 when Mr. Tepper was making the statements that  
25 are identified in the complaint, and, second, we have to look

1 at, as we do in the briefs, the law that applies to pre-  
2 contractual statements that are alleged to be fraudulent, and  
3 in that regard we believe that the law of Michigan which  
4 applies is actually more liberal than the law of New York.

5 So, first, with respect to the context in which  
6 Mr. Tepper made his statements, I recognize we're now at the  
7 pleading stage of this action and we believe there are issues  
8 of fact that will have to be developed, but it's already  
9 apparent from the pleadings and from the record in this case  
10 what was going on in December 2007 and the months leading up to  
11 that. What was going on was that Appaloosa was campaigning  
12 aggressively and had succeeded to become the lead plan investor  
13 and it had won the competition, it had pushed aside other  
14 parties who were expressing a willingness to provide the  
15 funding that Delphi needed, and any fair reading, we believe,  
16 of the facts and circumstances in late 2006 would show that  
17 Delphi and Delphi stakeholders could not possibly understand  
18 that Mr. Tepper was merely referring to the possibility that he  
19 would engage in what his attorneys now call an efficient  
20 breach. What was under discussion in December 2007 was a  
21 commitment that was vital to what was then the proposed plan of  
22 reorganization and what became the confirmed plan of  
23 reorganization.

24 If there had been a hint that Appaloosa was  
25 viewing this as an option -- and I appreciate that Your Honor

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1 referred to optionality this morning, but I do not believe that  
2 there was disclosure by Appaloosa that Appaloosa viewed the  
3 equity purchase commitment agreement and the accompanying  
4 commitment letter agreements as option agreements because the  
5 entire --

6 THE COURT: I mean it's right in the agreement.

7 We didn't have to say it because it was right there.

8 MR. FRIEDMAN: Well, I think in that regard, Your  
9 Honor, the issue of what's in the agreement is related to the  
10 fraud claim because if it, the agreement, said under no  
11 circumstances can the plan investors be required to fund their  
12 commitments, I think we would have a different case. I believe  
13 -- and we've explained this in our briefs -- that under the  
14 EPCA the right of specific performance is not excluded, it is  
15 not waived and the notion advanced by the defendants that the  
16 cap on liability should be read as precluding in any  
17 circumstances, enforcement of the commitment. We think that is  
18 an insupportable reading of the EPCA and that relates to why we  
19 believe Mr. Tepper's assurance that Appaloosa was funding a  
20 minimum of \$1.1 billion is misleading and fraudulent under all  
21 the circumstances when it was made. This case is not --

22 THE COURT: Is that argument separate from the  
23 argument that when you contend he's saying a deal is a deal it  
24 means a performed deal? You're not allowed to say the deal  
25 itself but a deal is a deal means a performed deal?

1                   MR. FRIEDMAN: I would answer that, Your Honor, by  
2 saying with respect to the statement, "a deal is a deal," it is  
3 necessary to look at that statement in the context in which it  
4 was made and when it's made in the context of Mr. Tepper saying  
5 expressly Appaloosa is committing a minimum of \$1 billion of  
6 his own capital and at that time he says a deal is a deal I do  
7 not believe that anybody listening to those statements could  
8 infer that Mr. Tepper is saying anything other than our deal is  
9 our commitment of \$1 billion as opposed to the spin that  
10 defendant's counsel now tries to put on it that all Mr. Tepper  
11 was saying was that we've got a deal and we've got outs and  
12 we'll take advantage of whatever outs we can.

13                   THE COURT: What about the notion that the context  
14 that you're referring to generally includes statements that the  
15 debtor has made that the prior version of the deal which had  
16 the same language in it did have a cap?

17                   MR. FRIEDMAN: The statements by the debtor which  
18 are pointed to by the defendants in these papers include in  
19 particular the statement in the disclosure statement that both  
20 refers to the cap and states that there is no specific  
21 performance provision in the EPCA. When we look at the  
22 circumstances, Your Honor, in December 2006 we have  
23 circumstances that are very different from the circumstances  
24 that existed on April 4, 2008, in particular, we have the  
25 circumstance that Delphi did not have exit financing in place,

1 there was necessarily tremendous uncertainty as to whether  
2 Delphi would obtain that financing and, certainly, it was  
3 reasonable for Delphi in looking at it's legal options as of  
4 December 2006 to recognize as it did in statements that were  
5 made on the record that Delphi might be able to bring a claim  
6 for anticipatory repudiation based on certain conduct by the  
7 plan investors. That is a very different set of circumstances  
8 from the circumstances that ultimately came to exist in April  
9 2008 when Delphi had, as we allege, fully complied with all of  
10 the conditions applicable to it.

11 THE COURT: But the fraud you're alleging isn't in  
12 April, it's in December 2007; right?

13 MR. FRIEDMAN: Yes. I was going into the  
14 difference between December and April in response to Your  
15 Honor's question about Delphi's statement concerning specific  
16 performance and the basic point I'm trying to make is that as a  
17 practical matter Delphi could have taken a very dim view of the  
18 prospects for specific performance as of December 2007 and I do  
19 not believe that Delphi stated under no circumstances even if  
20 the EPCA is amended, even if we comply with all the conditions  
21 we would be unable to get specific performance.

22 THE COURT: Because the request would have been  
23 moot because it couldn't have complied with the other  
24 covenants?

25 MR. FRIEDMAN: Exactly. It just didn't come up at

1 that time. Delphi was making a statement about the situation  
2 in which it found itself and the issue at that time was whether  
3 Delphi should be embarking on litigation under the prior  
4 version of the EPCA or moving forward with these plan investors  
5 and agreeing to an amendment.

6 THE COURT: Well, let me turn -- unless you want  
7 to make --

8 MR. FRIEDMAN: No.

9 THE COURT: Even assuming that you convince me  
10 that for purposes of this motion what Mr. Tepper said in his  
11 declaration and in court is sufficient to be misleading and a  
12 misrepresentation and not a description of the truth, what is  
13 your response to the argument that it's on all fours with the  
14 contract claim, i.e., all that you're saying he misrepresented  
15 was his intention not to perform the contract -- his intention  
16 to breach was not revealed, in other words.

17 MR. FRIEDMAN: Two things, Your Honor. First,  
18 under Michigan law -- and we've cited the cases in our brief --  
19 a bad faith promise is actionable as fraud.

20 THE COURT: But -- I don't want to forget the main  
21 point, but the fraud happened here. I mean if it happened at  
22 all this fraud happened literally right in this courtroom. It  
23 would seem to me that no state would have a greater interest in  
24 that than New York. What's your response to that?

25 MR. FRIEDMAN: The response to that, Your Honor,

1 is, under the authorities that we have cited in our brief, in  
2 general the law that governs a fraud claim is the law of the  
3 place where the injury occurred and I appreciate what Your  
4 Honor is saying about the interests of New York but where the  
5 victim of the fraud is a substantial Michigan corporation, as  
6 Delphi is, the authorities that we have cited, which are not  
7 contradicted by anything that the defendants have cited, have  
8 said that the principal and foundational element under choice  
9 of law principles with respect to fraud claims is the place of  
10 injury; and if the place of injury -- and for a corporation the  
11 place of injury is where the corporation is located. The cases  
12 that are cited by the defendants in their reply brief on choice  
13 of law either do not involve fraud claims or they involve fraud  
14 claims where the plaintiffs were seeking the application of New  
15 York law. They have not cited any cases where a plaintiff from  
16 another state such as Delphi here was urging the application of  
17 its home state law to a fraud claim and the Court ruled some  
18 other jurisdiction, be it New York or somewhere else, has a  
19 greater interest.

20 THE COURT: Okay. Well, just humor me for the  
21 moment. Assume New York law applies -- and I hear what you're  
22 saying -- but assuming New York law applies, why wouldn't this  
23 be precluded by the basic principle laid out in  
24 Bridgestone/Firestone?

25 MR. FRIEDMAN: Well, as Your Honor was discussing

1 this morning, there are exceptions to the Bridgestone/Firestone  
2 rule which as a general matter precludes assertions of fraud  
3 claims that are duplicative of contract claims; and one of the  
4 circumstances in which New York law recognizes that exception  
5 is where there are damages recoverable for the fraud claim that  
6 are different from the damages that would be recoverable on the  
7 breach of contract claim, and the VTech case that was discussed  
8 this morning expressly holds that in a situation where the  
9 contract provides for a cap on damages that's a basis for a  
10 Court to uphold a fraud claim that would otherwise be viewed as  
11 duplicative of the contract claim.

12 THE COURT: But that contract permitted, you've  
13 carved out from that cap the claims for torts and the like  
14 which would include fraud claims. I mean I think that's how  
15 the defendants distinguish it or try to distinguish it.

16 MR. FRIEDMAN: The contract in this case, Your  
17 Honor, in particular Section 11(b) which provides for a cap on  
18 liability, does say that it's a cap on liability "under this  
19 agreement" so I would think that would be read as liability  
20 arising under the agreement for breach of the agreement and not  
21 liability for torts.

22 THE COURT: Let me just make sure --

23 MR. FRIEDMAN: I'm just turning to it now, Your  
24 Honor.

25 THE COURT: Yes. It does say "under this

1 agreement." Okay. I see what you mean.

2 MR. FRIEDMAN: The next point I would address,  
3 Your Honor, are the arguments by counsel for Goldman Sachs and  
4 for Harbinger that there's nothing in the complaint that --

5 THE COURT: I'm sorry, before you --

6 MR. FRIEDMAN: Yes.

7 THE COURT: Is that the only exception you're  
8 pointing me to -- to Bridgestone/Firestone on this point?

9 MR. FRIEDMAN: Yes.

10 THE COURT: As opposed from the other hidden  
11 conduct?

12 MR. FRIEDMAN: I believe that's the case, Your  
13 Honor.

14 THE COURT: Okay.

15 MR. FRIEDMAN: So the argument by counsel for  
16 Goldman Sachs and counsel for defendants other than Appaloosa  
17 is, we didn't do anything wrong.

18 THE COURT: Well, it isn't pled that they did  
19 anything wrong other than breach.

20 MR. FRIEDMAN: The complaint pleads a number of  
21 things, Your Honor, which we think respond to that point. The  
22 complaint pleads that all of the plan investors undertook an  
23 obligation to use reasonable best efforts to cooperate with  
24 Delphi and to do all things reasonable and necessary to achieve  
25 a consummation in closing under the EPCA. The argument by

1 counsel for Goldman Sachs is essentially an admission that  
2 Goldman Sachs did not live up to its best efforts obligation.

3 The case law makes clear that an obligation to use  
4 best efforts is an obligation that goes beyond the obligation  
5 of good faith and fair dealing that is inherent in every  
6 contract. The exact contours of what is required of a party  
7 who undertakes a best efforts obligation is in all cases a  
8 question of fact. What the courts say is that the exact nature  
9 of what a party is required to do in order to comply with its  
10 best efforts obligation is a function of who that party is,  
11 what is that party capable of? That is a very important  
12 consideration in this case, Your Honor. The reason why Delphi  
13 entered into the EPCA with these plan investors was because of  
14 who they are, and the reason why the best efforts obligation is  
15 particularly significant is because of who these plan investors  
16 are. So when counsel for Goldman Sachs essentially says, we  
17 tried to stay outside the fray, I do not understand how that  
18 can be reconciled with the obligation that Goldman Sachs  
19 undertook to use its reasonable best efforts to do all things  
20 necessary to achieve a closing. We would say, Your Honor, that  
21 as the facts are developed the obligation to use reasonable  
22 best efforts includes an obligation to communicate with other  
23 plan investors, communicate with Delphi, avoid the kinds of  
24 problems that came up, and the idea advanced by Goldman Sachs  
25 and other defendants that in the absence of specific culpable

1 conduct there's no basis for alleging an actual breach of  
2 contract, we think, should be rejected at the pleading stage.

3 THE COURT: Okay. That deals with the issue of  
4 breach, and I understand the argument; there's an additional  
5 point that Mr. Falcone made, which is that under Kalisch and  
6 the cases that followed it including Met Life and some district  
7 court cases, it's pretty clear that you need not only  
8 intentional conduct -- which you need to be liable for breach  
9 under the contract -- but also intentionally bad conduct;  
10 whether that rises to the level of an intended tort or is just  
11 pernicious, truly reckless, etc., you need bad conduct in order  
12 to get around a damages limitation, for example.

13 MR. FRIEDMAN: Yes.

14 THE COURT: He contends and the others, other than  
15 Appaloosa, have contended that that type of bad conduct has not  
16 been pled.

17 MR. FRIEDMAN: Well, the bad conduct that is  
18 required under Kalisch-Jarcho or the Bank of America/Solow case  
19 includes reckless indifference to the rights of others,  
20 reckless indifference to the harm inflicted on others. So at  
21 this stage of the case, Your Honor, I would say it's much too  
22 early to say whether Merrill Lynch and Goldman Sachs should or  
23 should not ultimately have the benefit of the liability caps  
24 that apply to them.

25 THE COURT: But don't you need to at least allege

1 that they knew about what Appaloosa was doing? I mean you've  
2 alleged what Appaloosa is doing. Don't you need to allege that  
3 either they were doing it, too, or that they knew about it and  
4 chose not to say anything or to keep it quiet?

5 MR. FRIEDMAN: Well, Your Honor, in the Bank of  
6 America case, as we've discussed, a key part of the intentional  
7 wrongdoing that was alleged and that was found sufficient by  
8 the Court was the demand by Solow, who is the landlord of Bank  
9 of America, for a payment of \$6 million. I would submit that  
10 the demand by UBS and Merrill Lynch and Harbinger and Pardus  
11 for \$82.5 million in the form of an alternate transaction fee  
12 is more outrageous and less justifiable than the demand by  
13 Solow for a \$6 million payment. Under his contract Solow had a  
14 right to be reimbursed for his out-of-pocket expenses in  
15 connection with reviewing proposed renovation plans, and the  
16 way landlords always do, he was figuring overhead and  
17 allocation of costs, and the Court found this to be improper  
18 and I'm certainly not defending what Solow did, but in this  
19 case when Merrill Lynch and UBS and Harbinger and Pardus took  
20 the position that Delphi's efforts to obtain financing on the  
21 most favorable possible terms in order to achieve a closing  
22 under this EPCA and consummate the confirmed plan -- the  
23 argument that that constitutes an "alternative transaction"  
24 that exposes Delphi to liability for \$82.5 million, I would  
25 say, Your Honor, that at the pleading stage there should be no

1 doubt that the allegations are sufficient. When all the  
2 evidence is in, the Court will be in a position to determine  
3 whether the wrongful conduct rises to the level that's required  
4 -- and I would emphasize that in the cases discussed by counsel  
5 for Merrill Lynch every one of those cases makes crystal clear  
6 that this issue is an issue of fact, and the case principally  
7 relied on by the defendants, which is the Noble  
8 Lowndes/Metropolitan Life case, which was decided prior to the  
9 Bank of America decision by the Appellate Division, First  
10 Department, the Appellate Division in the Bank of America case  
11 points out that in the Noble Lowndes case there was a lengthy  
12 jury trial and the result of the trial was the conclusion that  
13 the defendant did nothing more than refuse to perform its  
14 obligations. In other words, did nothing more than engage in  
15 what Appaloosa's counsel would call an efficient breach.

16 THE COURT: All right. Let me explore that a  
17 little bit. I mean you still have to comply -- even though  
18 this is a motion to dismiss, you have to comply with Bell  
19 Atlantic v. Twombly and plead sufficient facts where the  
20 context requires to make it plausible. The context here  
21 requires bad things or truly reckless -- I'm not sure there's  
22 much of a difference -- behavior and, I guess demanding a  
23 break-up fee on a spurious basis -- I guess unlike the Solow  
24 case they weren't saying, I'll perform if you give me this  
25 break-up fee, they were doing it sort of as a threat that, you

1 know, if you push this further you'll owe us a break-up fee.

2 Do you see any distinction there?

3 MR. FRIEDMAN: Well, yes and no, Your Honor. The  
4 reason why in the main I don't think there's a distinction is  
5 that I see the demand for the break-up fee here as part of a  
6 campaign of pressure to prevent Delphi from exercising its  
7 legal rights, and for that reason I'm not sure there's any real  
8 distinction between what Solow was doing in making an improper  
9 demand and what certain of the plan investor defendants were  
10 doing here in making improper demand, especially coupled with  
11 the allegation that the investor defendants were not complying  
12 with their obligation to use reasonable best efforts to  
13 consummate this plan and that on the contrary at a time when  
14 Delphi and other stakeholders were committed to doing all  
15 things necessary these defendants were seeking to avoid their  
16 obligations and --

17 THE COURT: I'm not sure there's anything in the  
18 complaint about the -- I mean there's a reference to the  
19 termination letter, I guess --

20 MR. FRIEDMAN: Yes.

21 THE COURT: -- and there's a reference to the  
22 letters that were sent before then. I guess that's the only  
23 place where the \$82 million is referred to; right?

24 MR. FRIEDMAN: Yes.

25 THE COURT: The threat that if you do this it will

1 trigger the alternative transaction. All right.

2 MR. FRIEDMAN: We also would rely on the  
3 obligation that in failing to fulfill their best efforts  
4 obligation the investors were either in willful breach and in  
5 reckless disregard of their obligations or helping Appaloosa --

6 THE COURT: I'm sorry, could you say that again?

7 MR. FRIEDMAN: Yes.

8 THE COURT: I missed that.

9 MR. FRIEDMAN: Under the circumstances of this  
10 case by failing to fulfill their best efforts obligations the  
11 investors were acting with reckless indifference to the rights  
12 of Delphi.

13 THE COURT: Then unless you plead something that  
14 says that -- I mean Appaloosa was a lead investor and the other  
15 investors were not entirely but somewhat restricted in what  
16 they could do as far as even talking to other parties, although  
17 Mr. Tepper said it would be okay to talk but not to be  
18 "mischievous," that was his phrase when he was talking about  
19 Goldman, don't you need to plead something that they knew that  
20 would have caused them to be acting improperly and badly as  
21 opposed to saying that they had an obligation to act properly?

22 MR. FRIEDMAN: Well, other than Goldman Sachs,  
23 what we have pleaded is that the investor defendants entered  
24 into a common interest agreement. We don't know what  
25 communications occurred behind that common interest agreement.

1 That will be a subject of discovery. All the investors who  
2 were a party to that common interest agreement were aligned  
3 with Appaloosa in fighting with Delphi on the exit financing  
4 and, therefore, it can be inferred that the investors other  
5 than Appaloosa had knowledge of the positions that Appaloosa  
6 was taking and whatever restrictions there might have been on  
7 the investors' ability to talk to other people, the investors  
8 had -- each one had, including Goldman Sachs, an obligation to  
9 cooperate with Delphi. The investors did not have the  
10 contractual right to hide behind the status of Appaloosa as the  
11 lead plan investor.

12 THE COURT: I don't want to spend much longer on  
13 this, but it seems to me that it's one thing to say that they  
14 were acting under a common interest agreement in connection  
15 with litigation against Delphi over the financing -- and  
16 perhaps making demands or threats about the "alternate  
17 transaction" fits into that -- but it seems to me you'd have to  
18 allege more than just a common interest agreement if you're  
19 going to link them to efforts that you've pleaded by Appaloosa  
20 in respect of chilling the exit financing and the stock price  
21 and all of that. I mean you could certainly -- it's hard for  
22 me to infer from a common interest agreement that the other  
23 three investors would have known about that.

24 MR. FRIEDMAN: I would submit, Your Honor, that  
25 the Court does not have to reach that question at the pleading

1 stage because in the contract here the other plan investor  
2 defendants are jointly and severally liable for the willful  
3 breaches of Appaloosa.

4 THE COURT: I believe here "willful" is just  
5 willful breach. It's not willful misconduct, it's just willful  
6 breach which I view as intentionally, knowingly breaching. I  
7 don't view that as the equivalent of acting badly for the  
8 purposes of Kalisch and those other cases.

9 MR. FRIEDMAN: The point I'm making is that  
10 whatever the nature of the allegations at this stage concerning  
11 Kalisch-Jarcho and its applicability to Goldman and Merrill,  
12 etc., as Goldman's counsel said, they are defendants in this  
13 case, they can't escape --

14 THE COURT: Well, no, but I know that they have  
15 made a motion to dismiss everything other than their liability  
16 for someone else's willful breach but it's not an all-or-  
17 nothing thing here, I can grant part of their motion and say,  
18 well, the specific performance counts are dismissed as to  
19 Goldman.

20 MR. FRIEDMAN: Well, let me say a couple of  
21 things, Your Honor -- one with respect to damages and one with  
22 respect to specific performance. First, with respect to  
23 damages, for each of the other plan investors there's a  
24 provision in the EPCA saying that each individual plan investor  
25 is jointly and severally liable for the breaches and each --

1                   THE COURT: Up to a certain dollar amount.

2                   MR. FRIEDMAN: Exactly, Your Honor, up to a  
3 certain cap.

4                   THE COURT: Except for ADAH. I don't think  
5 there's any cap on ADAH in that provision.

6                   MR. FRIEDMAN: Yes, that's correct. So with  
7 respect to that, the point I am making is it's not an issue to  
8 be determined at the pleading stage whether the ultimate  
9 financial liability of Goldman Sachs or Merrill Lynch will be  
10 in accordance with that contractual cap or in excess of that  
11 cap based on evidence that will be presented at trial. It's  
12 simply a question of what will the ultimate measure of damages  
13 or remedy be.

14                  THE COURT: Leave aside the damages part, assuming  
15 that there's nothing alleged about Goldman other than it stood  
16 aside and waited, and, unlike getting into Heaven, you're  
17 saying that's not enough for performance of a contract, and I  
18 tend to agree with you as far as a motion to dismiss is  
19 concerned given the best efforts provision; but you've also  
20 alleged specific performance against them and unless I read  
21 11(b) to be ambiguous or how you want to interpret it is clear  
22 on your side, the only way to get specific performance against  
23 Goldman, then, would be to, I think, apply the Kalisch line of  
24 cases; right?

25                  MR. FRIEDMAN: I would say it only slightly

1 differently, Your Honor, but I basically agree with what the  
2 Court is saying --

3 THE COURT: Okay.

4 MR. FRIEDMAN: -- that the way to get specific  
5 performance would be either to apply the Kalisch-Jarcho line or  
6 to agree with Delphi that specific performance is an available  
7 remedy under 11(b) as we think it is.

8 THE COURT: All right. But if that's not the case  
9 I'm having a hard time seeing how the complaint pleads  
10 sufficiently reprehensible behavior on Goldman's part to  
11 sustain the specific performance claim against Goldman.

12 MR. FRIEDMAN: Well, the specific performance  
13 claim --

14 THE COURT: That's separate and apart from the  
15 contract reading. I understand that, but I --

16 MR. FRIEDMAN: Right. Well, I was just going to  
17 say the specific performance claim is not a separate claim,  
18 it's a remedy that we are seeking for breach of contract, and  
19 whether that remedy is ultimately determined by the Court to be  
20 appropriate should be determined on the basis of the evidence  
21 that will be submitted.

22 THE COURT: Well, so you're saying you don't have  
23 to plead it? I mean why couldn't it be excluded now so that  
24 people don't have to take discovery on -- so that Goldman  
25 doesn't have to be the subject of discovery under Kalisch?

1                   MR. FRIEDMAN: Well, because I think in that --

2                   THE COURT: I mean it is listed --

3                   MR. FRIEDMAN: Yes.

4                   THE COURT: -- I mean you could -- I don't  
5 understand why I shouldn't rule on this point now?

6                   MR. FRIEDMAN: Because Goldman Sachs had a best  
7 efforts obligation.

8                   THE COURT: No, I understand that. Leaving that  
9 aside.

10                  MR. FRIEDMAN: Okay. Their breach of that could  
11 be sufficient because --

12                  THE COURT: The interpretation of 11(b) .

13                  MR. FRIEDMAN: Separate from 11(b) , I'm saying.  
14 Goldman Sachs' position as articulated in this Court that  
15 Goldman Sachs sat on the sidelines while other plan investors,  
16 savaged Delphi and Delphi stakeholders, could be a basis for a  
17 finding of --

18                  THE COURT: Right. I could see that if you  
19 alleged they knew about it or had reason to know about it, but  
20 if you don't say that why would it be a basis? Did they have  
21 an obligation to take discovery of their co-investors and  
22 constantly bombard them with questions about whether they're  
23 acting properly or not?

24                  MR. FRIEDMAN: Well, if as the record now reflects  
25 -- if what they did was absolutely nothing even to find out

1 what was going on, then, yes, that could be a basis for finding  
2 reckless indifference. I mean why was Goldman Sachs a plan  
3 investor, to sit on the sidelines and wait and see whether  
4 other plan investors complied with their obligations?

5 THE COURT: Okay.

6 MR. FRIEDMAN: The next point, Your Honor raises  
7 which is the next point I wanted to address -- is the issue of  
8 piercing the corporate veil, and the argument made there by  
9 Harbinger and Pardus is that there's not a sufficient  
10 allegation of fraud or other wrong in the complaint.

11 We would submit that the complaint does properly  
12 and sufficiently allege that the Harbinger and Pardus parents  
13 dominated and controlled the subsidiaries and used their  
14 domination and control to cause the subsidiaries to evade their  
15 contractual obligations and that under Brunswick and under the  
16 cases we cite is sufficient as a pleading matter.

17 THE COURT: Well, where does it say that they did  
18 that?

19 MR. FRIEDMAN: It's Paragraph 120 of the  
20 complaint, Your Honor.

21 THE COURT: Okay. "Caused the affiliates to  
22 breach."

23 MR. FRIEDMAN: Right. And what the Court said in  
24 Brunswick which, I think, is important in this case is that --

25 THE COURT: But Brunswick is -- I mean there have

1 been some developments since then.

2 MR. FRIEDMAN: Well, I'm pointing to Brunswick  
3 because the defendants say Brunswick supports their position  
4 and Delphi failed to respond to Brunswick.

5 THE COURT: Right.

6 MR. FRIEDMAN: So the point that Brunswick makes  
7 is that -- I mean I actually like what the Court says that the  
8 New York law in this area is hardly as "clear as a mountain  
9 lake in springtime."

10 THE COURT: Well, that's why I was referring to  
11 it. Since then it became more like Poland Spring. I mean it's  
12 pretty clear now.

13 MR. FRIEDMAN: Your Honor, what I would say is  
14 that the Brunswick court goes on to say that what the formula  
15 comes down to, once shorn of verbiage about control,  
16 instrumentality, agency and corporate entity, is that liability  
17 is imposed to reach an equitable result and what the cases say  
18 is that it's very much a fact-driven inquiry.

19 THE COURT: But here the Second Circuit found it  
20 would not be inequitable where the party who was seeking to  
21 pierce the veil knew that they were dealing with a shell  
22 corporation and a parent.

23 MR. FRIEDMAN: Your Honor, that's true in a  
24 circumstance such as Brunswick where the issue and the claim is  
25 simply payment, that is Brunswick was dealing with an entity

1 that it knew to have no assets and it was an entity that was  
2 operating a business and was paying Brunswick's bills but when  
3 the business went bad the entity had no assets to pay the bills  
4 and Brunswick sought to pierce the corporate veil to obtain  
5 payment. There is nothing else going on in that case so the  
6 Court's conclusion was Brunswick knew that it was dealing with  
7 an entity with limited assets. That was all that case was  
8 about.

9                   What this case is about is about a parent using  
10 its control of the subsidiary to evade the contractual  
11 obligations. When we look at the cases cited by Delphi or  
12 cited by the defendants, all the cases say that the veil will  
13 be pierced to avoid a fraud or inequitable result or fraud or  
14 wrong and we submit that under the circumstances here the test  
15 is met as a pleading matter.

16                   THE COURT: So you're saying that Harbinger Del-  
17 Auto Investment Company, if it were a normal company, not under  
18 the thumb of Harbinger Capital Partners Master Fund I Limited  
19 which is the party to the funding agreement, it would have  
20 called on that company to perform under the funding agreement  
21 that it had with it. That was its asset, it refused to do  
22 that. The only reason it refused to do that is that it was  
23 under the thumb of the parent and, therefore, it breached.

24                   MR. FRIEDMAN: I would say that and one other  
25 thing, Your Honor, which is that all of the activities of

1 Harbinger Del-Auto leading up to the closing including  
2 Harbinger Del-Auto's fulfillment or non-fulfillment of its best  
3 efforts obligations, we have alleged, were all caused and  
4 dominated and controlled by the parent.

5 THE COURT: Okay. But that kind of goes back to  
6 the earlier point, which is whether I'm satisfied that you've  
7 alleged with enough specificity that the investor Pardus and  
8 Harbinger entities were acting sufficiently wrongfully under  
9 the control of their parent and I guess that goes back to the  
10 same point, which is what does a best efforts provision mean,  
11 does it require you to do some due diligence and be proactive  
12 or is it enough to say, I'm ready, willing and able and I don't  
13 care what anyone else is doing, I don't have any reason to know  
14 what anyone is doing, call me when it's time for the closing.

15 MR. FRIEDMAN: I would submit, Your Honor, that  
16 the head in the sand, call me when it's time for the closing,  
17 is not in compliance with the best efforts obligation  
18 especially under the circumstances of this case where the  
19 record establishes that there is such heavy reliance on these  
20 plan investors and who they were.

21 THE COURT: Okay. I think those were the main  
22 points but there was the other point about equitable  
23 subordination also being precluded by the liability cap in the  
24 Pardus and Harbinger commitment letters -- that equitable  
25 subordination is not something that you get money damages for.

1 MR. FRIEDMAN: There's a sort of a fundamental  
2 issue, Your Honor, about the proper interpretation of both the  
3 EPCA and the commitment letter agreements. The defendants now  
4 conceded that specific performance is an available remedy under  
5 the EPCA and they argue, however, that it's limited to \$250  
6 million and they argue that it's not available under the  
7 commitment letter agreements. We think it's necessary and  
8 proper under the law to read the EPCA and the commitment  
9 letters together. They're obviously executed at the same time,  
10 the EPCA refers to the commitment letter agreements, they need  
11 to be interpreted together in a way that is coherent, looking  
12 at the two sets of agreements as an integrated whole. The  
13 suggestion that specific performance under the EPCA is limited  
14 to \$250 million, we would submit is flatly contradicted by  
15 Section 18 of the EPCA which expressly provides that the rights  
16 and remedies in the EPCA are cumulative and not exclusive. So  
17 the defendants take the position that the rights and remedies  
18 set forth in Section 11(b) are exclusive and that a broader  
19 right of specific performance that is clearly preserved under  
20 Section 18 does not exist. In fact, the defendants in their  
21 papers point to the word "notwithstanding" which appears in  
22 Section 11(b) as if that enables 11(b) to trump Section 18 but  
23 the word "notwithstanding" in Section 11(b) refers to  
24 notwithstanding the foregoing. It's clearly not --

25 THE COURT: But humor me for the moment and assume

1 that I view the commitment letters as a separate agreement and  
2 governed by their own terms, separately. Do you have any --  
3 I'm just dealing with a specific point that equitable  
4 subordination is somehow ruled out by the language in the  
5 commitment letter.

6 MR. FRIEDMAN: I don't think equitable  
7 subordination or any equitable remedy is ruled out by the  
8 language of the commitment letter. I think at most there is an  
9 ambiguity either within the commitment letter or when the  
10 commitment letter is read with the EPCA. I say that because  
11 the commitment letter expressly provides in precise detail for  
12 the commitments that are being funded by each of the commitment  
13 parties. That funding is an essential component of the EPCA  
14 and when the two are read together the idea that specific  
15 performance under the EPCA is limited to \$250 million and  
16 specific performance under the commitment letter is not  
17 available at all, we think that's simply a case of the  
18 defendants choosing words that they like and not paying  
19 attention to contractual words and provisions that they don't  
20 like.

21 THE COURT: Okay. I mean if you look at the  
22 commitment letters, though, they do say "the liability of  
23 Pardus shall be limited to monetary damages only," which is not  
24 in the EPCA -- that type of language.

25 MR. FRIEDMAN: Right. But when you read the

1 commitment letters together with the EPCA we believe that the  
2 proper interpretation of "liability" as it's used through the  
3 EPCA and in the commitment letters is that it's a reference to  
4 monetary damages and not an exclusion of specific performance.  
5 So, for example, there are other provisions in the commitment  
6 letter if we look at the -- which one are you looking at, Your  
7 Honor?

8 THE COURT: The Pardus one which is Exhibit 15 to  
9 Ms. Cohen's declaration.

10 MR. FRIEDMAN: Okay. I have the --

11 THE COURT: I mean it's the same language in the  
12 other two.

13 MR. FRIEDMAN: Right. Right. Okay, so the  
14 language that I'm looking at, in the AMLP letter, is the  
15 language that says, "AMLP shall not be liable to fund to the  
16 investor any amounts hereunder other than to fund the purchase  
17 obligation unless and until any party to the agreement other  
18 than the company commits a willful breach of the agreement."

19 THE COURT: Right.

20 MR. FRIEDMAN: So that's a suggestion that we  
21 would interpret as carving out the purchase obligation from the  
22 liability scheme that pervades the EPCA and the commitment  
23 letters.

24 THE COURT: But then unlike the EPCA, here, this  
25 operative paragraph does say "notwithstanding any other term or

1 condition of this agreement" and then it says, "the liability  
2 of AMLP shall be limited to monetary damages only."

3 MR. FRIEDMAN: Well, at a minimum we think that  
4 creates an ambiguity, because when we go back to the beginning  
5 of the second paragraph in all of these letters there's an  
6 express confirmation of the commitment to provide funds, and  
7 that commitment is an essential component of the EPCA which is  
8 an essential component of the plan.

9 THE COURT: Okay.

10 MR. FRIEDMAN: Unless Your Honor has further  
11 questions, I'll sit down for now.

12 THE COURT: Well, no, you had other points you  
13 were going to make too.

14 MR. FRIEDMAN: No, that covers what we needed to  
15 address.

16 THE COURT: That covers what you needed to  
17 discuss?

18 Okay.

19 MR. SHORE: Could we have a short break, Your  
20 Honor, to make sure we don't cover the same ground?

21 THE COURT: Yes. Why don't I come back in about  
22 ten minutes. Does that work?

23 MR. SHORE: Perfect, Your Honor. Thank you.

24 THE COURT: So at 3:20 or so.

25 [Recess.]

1                   THE COURT: Mr. Friedman, I have one question for  
2 you on the veil piercing claim.

3                   If the wrong that the parent supposedly did --  
4 let's assume no other wrongs are alleged in the complaint other  
5 than that the parents caused the subs to breach, and in  
6 particular did they cause them to breach trying to enforce the  
7 funding commitment itself. Wouldn't that get you back to the  
8 damages limitation in the funding commitment itself because  
9 that's what would cure the wrong, is to enforce the contract,  
10 which has that damage limitation in it?

11                  MR. FRIEDMAN: I believe the answer to your  
12 question, Your Honor, is yes and we believe that properly  
13 interpreted a decree of specific performance aimed at the plan  
14 investors --

15                  THE COURT: Is permissible under the language.

16                  MR. FRIEDMAN: -- would be enforceable and that  
17 the parent entities would not be able to avoid a decree by  
18 saying our liability is limited to monetary damages only,  
19 because in the case of a decree of specific performance,  
20 assuming the Court decides it's warranted, the two agreements  
21 would have to be read together as they are intended to be.

22                  THE COURT: Okay. Thank you.

23                  MR. BAUMSTEIN: Good afternoon, Your Honor. We'll  
24 change the order and deal with the piercing claim first this  
25 time.

1                   Your Honor, on the Brunswick case I would  
2 respectfully submit that Delphi has it kind of turned around.  
3 Brunswick lived in a world in which New York law had not yet  
4 been settled as to whether or not there was a requirement  
5 independently not only of domination and control but also a  
6 requirement of fraud.

7                   THE COURT: Well, not just fraud, fraud or wrong.

8                   MR. BAUMSTEIN: Fraud or wrong -- and I don't mean  
9 to limit it to fraud -- fraud or wrong.

10                  THE COURT: Okay.

11                  MR. BAUMSTEIN: What the Brunswick Court said was  
12 notwithstanding that it's possible that under New York law  
13 there is absolutely no requirement for fraud or wrong,  
14 nevertheless, when you have a situation which Delphi admits  
15 exists here and that is that a company contracts with another  
16 company that it knows has no assets, then aside from the issue  
17 of -- whether you require fraud or wrong even if you don't  
18 require a fraud or wrong, the basic premise of the entire veil  
19 piercing theory falls away because there is no inequity or  
20 unfairness in having a company deal with the entity that it  
21 knew it was dealing with and the whole veil piercing --

22                  THE COURT: These companies had a lot of assets in  
23 one respect; they had a contract within their respective cases  
24 with Pardus, Harbinger and Appaloosa under which those three  
25 entities agreed to put in a lot of money -- over \$1 billion.

1                   MR. BAUMSTEIN: Veil piercing is only pleaded in  
2 this complaint as an alternative to a claim under the  
3 commitment letters. The commitment letters would be the one  
4 and only source of the funding obligation Your Honor just  
5 referred to.

6                   THE COURT: Right.

7                   MR. BAUMSTEIN: Therefore, you don't get to veil  
8 piercing until you've gotten to the point of saying whatever  
9 the claim is that you're asserting cannot be sustained based on  
10 the commitment letters, which we believe it cannot. But if  
11 there's a claim under the commitment letters for a funding  
12 obligation, whether that claim would be asserted by Delphi,  
13 whether that claim would be asserted by one of the entities --  
14 the shell entities that signed these letters or they were  
15 parties to these letters as well -- in that case you don't get  
16 to piercing. The point is that if the letters do not provide  
17 for the basis of getting more than X dollars from the parents,  
18 piercing doesn't help.

19                   THE COURT: Assume for the moment -- I'm not  
20 asking you to agree with this, just assume for the moment that  
21 the EPCA does permit piercing and the commitment letters don't  
22 as to the respective signatories, so you'd have to deal with  
23 that situation.

24                   MR. BAUMSTEIN: Without accepting the premise --

25                   THE COURT: No, I know.

1                   MR. BAUMSTEIN: -- other than for sake of  
2 responding to it, Your Honor, I don't believe piercing is an  
3 analysis that takes place by contract. Piercing is an analysis  
4 that takes place based on the relationship between the parent  
5 and the sub.

6                   THE COURT: I'm sorry. I completely misphrased my  
7 question to you.

8                   Assume for the moment that the EPCA permits  
9 specific performance -- I meant to say that instead of  
10 "piercing" -- and the commitment letters don't -- and this is  
11 where I was going somewhat with Mr. Friedman -- it seems to me,  
12 perhaps arguable, that if in fact what is the basis for  
13 piercing here is not that Pardus and Harbinger caused a shell  
14 corporation to enter into the agreements with Delphi because  
15 Delphi knew they were shell corporations -- and by the way,  
16 I've confirmed your reference that you cited to me earlier on  
17 the pleading -- but rather that they caused those corporations  
18 not to have any assets by not enforcing the commitment letters.  
19 At that point, if you assume that the EPCA permits specific  
20 performance, has that bad act in essence gotten the parents out  
21 of their funding agreement limitation because they in essence  
22 should be viewed as the subs because they used the subs and  
23 their domination of the subs wrongfully, not to enforce the  
24 funding?

25                   MR. BAUMSTEIN: Your Honor, to the extent these

1 subs would have had any kind of right under the commitment  
2 letters to force funding, it would have been no different to  
3 Delphi's right to force the funding. So it's a wash, Your  
4 Honor, because there would be a claim under the commitment  
5 letter for that amount. So, again, the whole theory as pled  
6 but also as exists in the law, the whole reason why you get to  
7 piercing is because the contracts as written don't do what in  
8 fact should be done.

9 THE COURT: All right. Fine.

10 MR. BAUMSTEIN: In essence, Your Honor, that's --

14 MR. BAUMSTEIN: That's pretty much what I had,  
15 Your Honor.

16 | THE COURT: Okay.

17 MR. FALCONE: Good afternoon, Your Honor.

18 I still haven' heard a single allegation of a  
19 single act from any defendant other than Appaloosa that would  
20 justify equitable subordination claim or that would justify the  
21 public policy exception to the enforcement of liability  
22 provisions. The breach, if there was a breach of the best  
23 efforts provision in this contract, is not the kind of conduct  
24 that the Courts discuss in Kalisch-Jarcho or in Met Life or in  
25 any of the cases on which even the plaintiff has cited in

1 support of specific performance. Even if we intentionally  
2 breach the best efforts clause it's just a breach of contract.

3                   So I still haven't heard any allegation and I  
4 didn't hear Mr. Friedman say one thing about something that he  
5 can allege in the complaint that we did, that Harbinger did,  
6 that Pardus did, that Goldman did, that UBS did, that would be  
7 relevant either in support of the equitable subordination or  
8 the specific performance. Can this be decided on a motion to  
9 dismiss? You bet. Look at Judge Hellerstein's in Dyncorp. It  
10 wasn't a specific performance case but having found a liability  
11 limitation important in that case he didn't hesitate to dismiss  
12 the claims for damages that exceeded the cap. Of course, it's  
13 important. It's important for its discovery, it's important  
14 because baseless allegations of liability shouldn't be hanging  
15 out there in a complaint if they're unsupported. That's why we  
16 have 12(b)(6), that's why we have pleading rules. There's no  
17 question that you have to plead the facts to show that specific  
18 performance is an appropriate remedy. There's no Court that  
19 has said you can seek specific performance without pleading any  
20 facts that suggests that either your remedy at law is  
21 inadequate or that you are entitled to it, and it's clear from  
22 Dyncorp and even in the absence of a precedent it would still  
23 be clear that if facts have not been alleged in the complaint  
24 the motion to dismiss is the perfectly appropriate stage to  
25 take care of this.

1                   THE COURT: Well, on that score what Mr. Friedman  
2 has said in addition to the reference to the parties other than  
3 Goldman having a joint interest agreement and coordinating  
4 their responses on litigation, and in addition to the  
5 uncertainty as to whether in light of their best efforts  
6 obligation they were required to do more than just simply stand  
7 and wait for the closing, is the -- both of which I have some  
8 skepticism over -- is the suggestion that rather than try to  
9 work to make the deal work, the investors other than Goldman  
10 together threatened the alternative transaction fee.

11                   MR. FALCONE: First of all, I'm not aware of any  
12 threat by Merrill for the alternate transaction fee. Second,  
13 best efforts clauses -- just as the duty of good faith and fair  
14 dealing, the best efforts clause does not require you to waive  
15 you rights under a contract. The best efforts clause doesn't  
16 create rights that are not in the contract, it doesn't require  
17 a party to waive its rights --

18                   THE COURT: Well, this best efforts clause went to  
19 more than this contract, it went to the transactions  
20 contemplated by the agreement which includes the financing and  
21 everything else.

22                   MR. FALCONE: There's no authority for the  
23 proposition that the best efforts clause in this contract  
24 required any of these defendants to waive any right they had  
25 under the contract.

1                   THE COURT: But that's a tautology. Part of the  
2 contract is that they use their best efforts not only to  
3 perform the contract but the related transaction -- to cause  
4 the related transactions to come to pass.

5                   MR. FALCONE: But that can only be understood to  
6 mean within their rights of the contract because --

7                   THE COURT: But the contract itself says that.

8                   MR. FALCONE: If it means something more than that  
9 then we have an unenumerated set of rights for the plaintiff.

10                  THE COURT: Well, it certainly means you can't  
11 chill those things; right?

12                  MR. FALCONE: It may well mean you cannot actively  
13 interfere but there's no allegation of active interference  
14 against any of these other defendants other than Appaloosa.

15                  THE COURT: The allegation is rather than even let  
16 Delphi raise the issue as to whether your clients were in  
17 breach, your clients said that Delphi would owe \$82.5 million.  
18 That's a pretty serious threat when you consider that you would  
19 think that parties dealing with each other in good faith to  
20 make the transactions including the financing happen would talk  
21 together and ultimately look to the arbiter of the issue, the  
22 Judge, as to whether there's a solution as opposed to saying,  
23 you owe us \$82 million, ha, ha, ha. That does sound like  
24 Sheldon Solow to me.

25                  MR. FALCONE: Well, it doesn't to me, Your Honor,

1 and let me explain why.

2 THE COURT: Okay.

3 MR. FALCONE: The Court in Solow made it clear  
4 that there was a cluster of facts that supported an inference  
5 that the defendant in that case was trying to exert economic  
6 duress. One of those things was remember that in Solow you're  
7 not dealing with a defendant who terminated a contract, you're  
8 dealing with a defendant who continually, time after time after  
9 time, refused to perform by renewing plans for renewal, not --

10 THE COURT: All right. But here what Mr. Friedman  
11 is saying -- and I appreciate this is all only through  
12 referring to a letter and I haven't gone back and read the  
13 letter so I don't know whether it was on behalf of all the  
14 investors except Goldman or just Appaloosa or whatever but what  
15 Mr. Friedman is saying is that similarly here the investors  
16 rather than talk or let the Court decide this issue said,  
17 you're going to pay us, and they weren't terminating and  
18 neither was Delphi.

19 MR. FALCONE: Well, again, I don't know what Mr.  
20 Friedman is pointing to to say where he says that the investors  
21 as a group demanded the fee. I don't know what he's pointing  
22 to. Secondly, in Solow you didn't have -- Solow didn't  
23 terminate the contract and end his rights. There's a  
24 fundamentally different way in which Solow used the contract.  
25 The allegation of economic duress was credible because --

1                   THE COURT: But I think the letter was also not a  
2 termination letter. The letter was sent as a threat well  
3 before the termination.

4                   MR. FALCONE: But then we terminated and if we had  
5 been trying to use that threat to coerce something that  
6 termination gave up the leverage and that's why the facts of  
7 this case are not on all fours with Solow. Solow never  
8 terminated that contract. He was spinning this scheme on and  
9 on and on in time.

10                  THE COURT: But the actual termination occurred  
11 after there had been no ability to pursue alternatives.

12                  MR. FALCONE: Once Appaloosa terminated the  
13 contract it makes clear --

14                  THE COURT: But that was two hours before the  
15 closing. Yes, it was clear because no one showed up.

16                  MR. FALCONE: But it made it clear that this was  
17 not a scheme to extract anything. If it was a scheme to  
18 extract something why would Appaloosa have terminated?

19                  THE COURT: Consistency. They had already done  
20 it, why not do it again?

21                  MR. FALCONE: Well, I think, Your Honor, if we  
22 look at the facts in Solow, the continuing nature of the  
23 breach, not terminating the contract, the fact that -- I mean  
24 here we do have an alternate transaction fee in the contract.  
25 We may have a dispute about whether it's due but in Solow the

1 absence of any contractual basis for the demand was -- I mean  
2 in this case there is a contractual basis for a demand and I  
3 believe the fee is rightly claimed but even if you thought that  
4 the fee was not rightly claimed you can't compare this to Solow  
5 in the way that what he was demanding was not only absent from  
6 the contract but in direct contradiction of its terms. The  
7 facts in this case just don't add up to the inference that the  
8 Court said could be drawn from the facts in Solow and the  
9 allegation which comes now in Delphi's opposition papers is  
10 inconsistent with the allegation in the complaint. The  
11 complaint alleges squarely that the contract was not performed  
12 because it was uneconomical, because they didn't like the  
13 economics of the deal. Period. That's the motivation.

14 THE COURT: But that doesn't stop the cogency to  
15 an allegation that to support that improper position the  
16 investors used this unwonted leverage.

17 MR. FALCONE: How would that effort have supported  
18 --

19 THE COURT: Because rather than work with the  
20 debtors to make the transaction happen, to have the financing  
21 work, consistent with the best efforts obligation, first,  
22 privately and then very publicly and in a very damaging way,  
23 the investors said, not only will we not work with you but if  
24 you even try to suggest that we're in breach you're going to be  
25 liable for \$82.5 million. That's not how a normal contract

1 party deals with its partner in the deal.

2 MR. FALCONE: I don't believe there's any  
3 allegation or a basis for an allegation that any of these  
4 defendants ever said if you say we're in breach we will then  
5 demand the fee.

6 THE COURT: Oh, I don't know if you were here  
7 during the 1142 argument, but that was all over the place and  
8 that's what your colleague here has said.

9 MR. FALCONE: Well, if that was happening at that  
10 point in time and the fee was never paid and the agreement was  
11 subsequently terminated because one or more defendants didn't  
12 like the economics of the deal why would that supposed threat  
13 constitute a ground for specific performance? It doesn't link  
14 up.

15 THE COURT: Because it's bad stuff. It basically  
16 comes down to that, it's bad action.

17 MR. FALCONE: But it's not bad stuff that caused  
18 any injury. Because the fee hasn't been paid and now Delphi  
19 has alleged --

20 THE COURT: It's all part of the same scheme. I'm  
21 not saying it's true, but it's all part of the same scheme to  
22 do whatever could be done to get out of this deal.

23 MR. FALCONE: But demanding the fee is not getting  
24 out of the deal.

25 THE COURT: You know, it's part of even getting

1 out of having to pay the 250 if you could cause the debtors to  
2 miss a condition. For example, by saying you can't even talk  
3 to us or the Court about whether we've breached, you can't  
4 suggest alternatives, for example, by paying out less cash,  
5 which normally an equity investor would be pretty happy about,  
6 then, you know, it's all part of the same theme that these  
7 investors were doing whatever -- leaving aside Goldman -- they  
8 could to get out of any liability. You know, with whatever  
9 threat, whatever they could do.

10 MR. FALCONE: Well, with all due respect, Your  
11 Honor, I don't think that the best efforts clause required the  
12 investors to accept a transaction that was inconsistent with  
13 the contract and, Your Honor, I know I'm speaking a little bit  
14 beyond the record now but I just want to prepare you, GM's  
15 participation as the major first lien lender in this company  
16 was anathema to the business plan of Delphi. Delphi's business  
17 plan on which this whole transaction was based was that it  
18 could grow its business through other suppliers and bringing GM  
19 in in a dominant -- from other carmakers and bringing GM in a  
20 dominant way was --

21 THE COURT: As a lender?

22 MR. FALCONE: -- was a major change. It was the  
23 major vendor and now it was going to be the major creditor of  
24 this company. The whole reason that GM spun off Delphi was  
25 that Delphi could grow its business by getting business from

1 other carmakers and now GM wanted to be both the principal  
2 customer and the principal creditor but to get --

3 THE COURT: You know what, that's going to be a  
4 hard one to convince me of because I view the role of a lender  
5 as being very different than the role of an owner or of a  
6 customer.

7 MR. FALCONE: It can be but when --

8 THE COURT: And the notion that you wouldn't even  
9 be able to talk about that, well, I just -- to me that seemed  
10 like a real squeeze.

11 MR. FALCONE: Your Honor, Mr. Friedman --

12 THE COURT: And it's certainly not what people in  
13 the bankruptcy world view as an alternative transaction when  
14 you're bargaining for the right to go out and deal with a third  
15 party on a higher and better basis.

16 MR. FALCONE: Your Honor, Mr. Friedman also made  
17 an allusion to joint and several liability saying that in light  
18 of that provision he didn't see why it was important to resolve  
19 the issue of whether specific performance is available to  
20 defendants other than Appaloosa.

21 THE COURT: I didn't agree with him on that.

22 MR. FALCONE: Okay. Thank you.

23 Just one comment, Your Honor, as to Section 18.  
24 Section 11(b) is not a provision that creates rights. Section  
25 11(b) is a provision that curtails remedies. Section 18 cannot

150

1 add back what Section 11(b) takes away. So understanding that  
2 Your Honor has concerns about the interpretation of 11(b),  
3 whatever 11(b) takes away is not restored by Section 18.  
4 Section 18 says in addition to the rights and remedies provided  
5 in this contract. Section 11(b) is not providing remedies,  
6 it's curtailing remedies and that limitation on liability has  
7 to be enforced and is not at all intentional and it is not at  
8 all contradicted by Section 18.

9                   If you have no questions, Your Honor, I'll sit  
10 down.

11                   THE COURT: Well, let me explore that a little bit  
12 with you.

13                   Section 18 says the rights and remedies pursuant  
14 to this agreement are cumulative and are not exclusive of any  
15 rights or remedies which any party otherwise may have at law or  
16 equity. Your emphasis is on the "otherwise;" right?

17                   MR. FALCONE: Yes, Your Honor.

18                   My emphasis is on a couple of things. It's on the  
19 beginning of it that the rights and remedies provided in this  
20 agreement are cumulative. This paragraph is not --

21                   THE COURT: It says pursuant to this --

22                   MR. FALCONE: It's similar, Your Honor. The  
23 concept is similar to the cases that Your Honor previously  
24 cited about liquidated damages provisions. There are cases  
25 that say that just because a contract gives the right of

1 liquidated damages doesn't mean we should assume it's excluding  
2 everything but there's other things, but those are not cases  
3 that address liability limiting provisions, provisions that cut  
4 back on rights and 11(b) is so clearly drafted in that way, in  
5 fact it begins with a release. Section 11(b) begins with both  
6 sides of the transaction releasing all claims under the  
7 contract against each other except for willful breach and then  
8 it proceeds for there to cap the amount of liability. So this  
9 provision is not even being addressed in 18, 18 is only  
10 addressing provisions that create rights and saying they should  
11 not be construed as being exclusive.

12 THE COURT: Okay.

13 MR. FALCONE: Thank you, Your Honor.

14 MR. ROSENTHAL: Good afternoon, Your Honor.

15 THE COURT: Good afternoon.

16 MR. ROSENTHAL: I'm not interested in debating any  
17 of the legal or factual points but just in response to some of  
18 the points you made with Mr. Falcone just now, just directing  
19 the Court to the actual allegations in the complaint itself,  
20 and I have before me the UBS complaint by the Sussman firm;  
21 also the allegations with respect to Merrill, Pardus, Harbinger  
22 and Goldman, are as I understand them the same in the other  
23 complaint. But with respect to the alternate transaction  
24 agreement and the demand for the \$82 million, the only place in  
25 the UBS complaint that it's referenced is in Paragraph 51 in

1 the termination notice on April 4th. There's no reference or  
2 allegation at all that anybody said before April 4th that there  
3 was a demand for money, that there was a threat of an alternate  
4 transaction compensation, nor was there any allegation at all  
5 in the complaint that there was an offer that it won't be  
6 asserted under certain conditions or provided the debtors do or  
7 don't do something. It's only attacking the termination notice  
8 itself so I think when we look to see what's alleged --

9 THE COURT: I think that's right. Right, Mr.  
10 Friedman? It really references the termination notice, nothing  
11 else?

12 MR. FRIEDMAN: Right. But we would submit, Your  
13 Honor, that everything in the record on this motion can be  
14 considered by the Court and --

15 THE COURT: Well, where else is it in the record?

16 MR. FRIEDMAN: Well, no, I'm saying in the record  
17 in these bankruptcy cases and we would and we could --

18 THE COURT: Well, I mean this is a letter that --  
19 it may have come in as an exhibit somewhere but I don't have it  
20 --well, all right.

21 MR. FRIEDMAN: Well, I'd just finish the point.  
22 We would and could amend the complaint to add the specific  
23 reference to the alternate transaction letter that we're  
24 discussing today.

25 THE COURT: All right.

1                   MR. ROSENTHAL: In response, I would just say if  
2 there was such a letter earlier I think we're entitled to have  
3 that as an allegation in the complaint itself.

4                   THE COURT: Okay.

5                   MR. SHORE: Chris Shore from White & Case for  
6 Appaloosa.

7                   Two points with respect to the fraud. With  
8 respect to what's now been called the behind-the-scenes  
9 activity, and I trust that everybody recognizes still that it's  
10 an allegation and it's one that Appaloosa or ones that  
11 Appaloosa is just as concerned about and if we have to get  
12 there, we'll get there. But allegations of short selling and  
13 allegations of talking to lenders are not frauds as pleaded in  
14 this complaint. They're certainly acts which are pled, facts  
15 which are pleaded, but we're not here on facts, we're here on  
16 have they presented pursuant to Rules 9 and 12 a pleaded legal  
17 theory to go forward and if what they're talking about is a  
18 fraud and the bad stuff, we need the who, what, when, where,  
19 why and how and a legal theory upon which Appaloosa can be held  
20 liable which meets Twombly which we can respond to. This  
21 whole bad acts concept --

22                   THE COURT: Wouldn't it, though, be a material  
23 failure to disclose, given an obligation to do so?

24                   MR. SHORE: Failure to disclose in what context?  
25 If we're talking about short selling we are entitled to a

1 pleading that says how the short sale occurred, who was  
2 involved, how they tie it to us and then how the debtor was  
3 harmed. We're entitled to that and with respect to the talking  
4 to the lenders, what lender was talked to, who was talked to  
5 and what's their good faith basis under Rule 11 for saying we  
6 secretly pulled the strings on that? We are entitled to that  
7 and that does not form the basis right now of an actionable  
8 fraud claim against AMLP. The fraud claim that is attempted to  
9 be pleaded against AMLP is in 60 and 61 which Mr. Friedman  
10 referred to, and that one is the, I was led to believe that  
11 this was a contract that was going to close no matter what, and  
12 I didn't hear any textual analysis that supported a reading of  
13 the contract that said it was going to be closed no matter  
14 what. In fact, the contract expressly contemplates that there  
15 are two types of termination notices we could send; one is if a  
16 party was in breach and another is if April 4th came and in  
17 that instance the contract expressly contemplates --

18 THE COURT: I'm sorry, I thought you were going  
19 somewhere else. I thought you were going to say the other  
20 basis would be we could choose to breach and then pay the  
21 amount.

22 MR. SHORE: That's right. If you get to April 4th  
23 you can send a termination notice. The argument had been made  
24 that we said that got us out of liability, it doesn't. Section  
25 12(h) says expressly if we were in breach of that contract,

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1 even wilfully so on April 4th, we'd suffer liability up to \$250  
2 million. So I have not heard any textual analysis of this  
3 contract which says that the debtors could have reasonably  
4 relied on any of those statements about, I'm really interested  
5 in this deal. Leave aside that they aren't misrepresentations  
6 of fact, leaving aside that they don't form the basis of a  
7 claim but even if all of that were true, the debtors who are  
8 asserting a fraud claim and what they've asserted in this  
9 complaint don't have as a matter of law a basis to rely on  
10 that.

11 THE COURT: Do you have anything on the choice of  
12 law point beyond what's set forth in your papers?

13 MR. SHORE: No, I think Your Honor noted there are  
14 a whole bunch of reasons including the one that I didn't  
15 mention as to why a New York Court would want to apply. I  
16 think we're misstating to some extent to say that the law is  
17 it's where the injury occurs unless other things happen. The  
18 law is which state has the greatest interest in it, whether no  
19 other factors will default to the law where the injury  
20 occurred. So in the end of the day I think it's New York,  
21 we've addressed it as New York. I think it should be New York  
22 but I don't see the material difference between Michigan law  
23 and New York law at least now for the purposes of determining  
24 the motion to dismiss on the theories we're talking about that  
25 will require a different result which leads us, I think, to a

1 false conflict.

2                   A quick thing and on the last point on fraud with  
3 respect to the special damage point, right, so the only  
4 exception they've argued for why we entered into the contract,  
5 even if it was we can show reasonable reliance is because we've  
6 got special damages. I don't see a special damages allegation  
7 in the complaint. In fact, as I said before and wasn't  
8 responded to --

9                   THE COURT: Do they have to do that?

10                  MR. SHORE: Yes, they have to do that particularly  
11 under Rule 9. But in any event, special damages are --

12                  THE COURT: I know they have to show damages but  
13 do they actually anticipate the Bridgestone/Firestone objection  
14 and allege special damages?

15                  MR. SHORE: If they're going to claim special  
16 damages, yes. Why would they --

17                  THE COURT: No, no, under Rule 9 you have to,  
18 among other things, plead damages so now -- under Rule 12 too --  
19 -- but do you have to plead special damages --

20                  MR. SHORE: Yes.

21                  THE COURT: -- as opposed to show the Court in  
22 connection with a motion to dismiss or a motion for summary  
23 judgment that there are special damages?

24                  MR. SHORE: But the point being, is the theory of  
25 this complaint is that the damages were all, of course,

1 foreseeable from what we were doing. These are the damages  
2 that flow from the breach of contract.

3 THE COURT: But I guess I'm not sure why this is  
4 relevant anyway, given that the complaint clearly references  
5 and incorporates the EPCA and the commitment letters and so I  
6 can read them to determine whether there's special damages or  
7 not.

8 MR. SHORE: Okay. My point being is that there  
9 are multiple hurdles when we're talking about the Paragraphs  
10 60/61 fraud that is being pressed here.

11 THE COURT: That doesn't seem to be one of them,  
12 though.

13 MR. SHORE: No, the issue would be is there an  
14 exception under the New York or the Michigan law which would  
15 allow them to proceed with a fraud claim and the only one that  
16 was articulated was the special damages and we don't need to  
17 dwell on that.

18 Corporate form. Now, let me address that real  
19 quick. With respect to the behind-the-scenes activity, I mean  
20 if they show that's an actionable wrong we're not -- the  
21 piercing isn't being sought for those purposes. Actually,  
22 Appaloosa was the party who was sued for the fraud. It was not  
23 AMLP was sued for the fraud and, therefore, they wanted to --  
24 ADAH was sued for the fraud and they wanted to seek the whole  
25 AMLP liable. They sued Appaloosa directly. So the piercing

1 isn't being brought in the context of the fraud claim, the  
2 piercing is being brought in the context of we're dealing with  
3 a contract and can they pierce -- so my point being is that the  
4 distinction was being drawn in the piercing context based upon  
5 a fraud having occurred. I think the piercing only comes up in  
6 the context where we're passed a fraud and we're only dealing  
7 with a breach of contract.

8 THE COURT: What about wrongdoing? Wasn't ADAH  
9 under the contract supposed to be the entity that dealt with  
10 the additional investors?

11 MR. SHORE: Yes.

12 THE COURT: And they allege that Appaloosa dealt  
13 with them and concerted or concocted this whole approach to get  
14 out of the agreement by among other things trashing the  
15 financing. So either they're doing it directly or they're  
16 doing it through ADAH wrongfully.

17 MR. SHORE: I think in working through it I think  
18 the only time those allegations come up or when we're dealing  
19 in the EPCA setting which you still deal with the Brunswick  
20 issue; right? I mean I don't think you get around the  
21 Brunswick issue by talking about bad acts.

22 THE COURT: When it's a matter of knowing you're  
23 dealing with an undercapitalized entity, that's right, but  
24 where it's not knowing that you're dealing with an entity that  
25 you can't trust, I think that's something different.

1                   MR. SHORE: That may be the basis for asserting a  
2 direct fraud claim against AMLP or a direct claim on these bad  
3 acts against AMLP. I just don't see --

4                   THE COURT: Not if they were causing ADAH, which  
5 is the party under the contract that's supposed to be dealing  
6 with the additional investors, to scheme like this -- it would  
7 seem to me.

8                   Remember, Delphi was not permitted to talk to  
9 those people. ADAH was supposed to be the interface. If  
10 instead of that or in control of ADAH, Appaloosa caused ADAH to  
11 do X, Y and Z, then that doesn't seem to me to be covered by  
12 Brunswick because, certainly, Delphi couldn't be said to have  
13 expected that ADAH under the control of Appaloosa would have  
14 been doing that as opposed to in Brunswick where the Court  
15 said, of course, you expect a shell to be a shell because you  
16 knew they were a shell.

17                  MR. SHORE: Right. Okay. I mean I think if we  
18 see a repledged claim with respect to who was talking to who,  
19 when and what was being done, I think that will allow you to  
20 pick apart a little closer the allegations which would support  
21 or not support a piercing on the contract claim.

22                  THE COURT: That's probably correct.

23                  MR. SHORE: On the termination letter, that's  
24 another instance. That's just not in the complaint.

25                  THE COURT: Well, the termination letter is, but

1 the other letters aren't.

2 MR. SHORE: There are no other letters.

3 THE COURT: Well, I don't know --

4 MR. SHORE: Okay. I'm just saying so --

5 THE COURT: -- I don't know if there are or there  
6 aren't but --

7 MR. SHORE: -- so that's another instance in which  
8 we get a little more clarity. If they want to make an  
9 allegation that some other communication occurred they'll make  
10 that subject to whatever obligations they have to make that  
11 statement. But with respect to what's pleaded in the  
12 complaint, the termination notice contained a demand that can't  
13 fairly be read in the same way as --

14 THE COURT: I have a feeling, but maybe I'm wrong,  
15 that they'll be able to do that.

16 MR. SHORE: Coming now to just ending with two  
17 points on specific performance. I still haven't heard a  
18 definition of liability supported by anything which says that  
19 means money damages only, anywhere, anything. Just, we want  
20 you, Your Honor, to redefine the word and the latest  
21 explanation as to why you need to redefine the word is because  
22 the commitment letters are ambiguous. It says in the first  
23 part that we commit to \$1.1 billion. It says in the second  
24 part, notwithstanding the foregoing --

25 THE COURT: I don't find the commitment letters to

1 be ambiguous.

2 MR. SHORE: It's the same, though, with respect to  
3 the EPCAs.

4 THE COURT: That's where we part company.

5 MR. SHORE: Okay. With respect to the EPCAs the  
6 only explanation they've given is that liability means money  
7 damages. If they're arguing those two should be read together

8 --

9 THE COURT: I'm not.

10 MR. SHORE: Okay.

11 THE COURT: In fact, I'm arguing just the opposite  
12 with you, which is that the parties knew how to draft it right  
13 and they didn't.

14 MR. SHORE: And the only -- I mean I heard Your  
15 Honor talking -- we go to 11(b) where we talk about liability.  
16 The only thing we've talked about differently than what they've  
17 put forward in their papers is that parenthetical "under any  
18 legal theory" and I don't think they can create an ambiguity by  
19 saying "legal theory" refers to something other than a claim  
20 which you could bring at all or a claim in which you can bring  
21 any legal proceeding. A breach of contract is a legal theory  
22 so how can you read that paragraph as saying the aggregate  
23 liability if it's not money damages but if it includes  
24 equitable forms of relief, how can you read that as saying the  
25 aggregate liability of all the investors under the agreement

1 for any breach of contract including a willful breach shall not  
2 exceed 250? If there's a breach of contract --

3 THE COURT: If that's the case why in the  
4 commitment letter didn't the parties stop at (i) in Paragraph 3  
5 but felt they needed to put in (iii) as well?

6 MR. SHORE: Because the commitment letter was an  
7 obligation only for the payment of money. The only obligation  
8 under that commitment letter is the payment of money. So  
9 you're not going to get specific performance of that. The EPCA  
10 contains all sorts of other obligations of the parties that  
11 have nothing to do with a monetary obligation.

12 THE COURT: Okay.

13 MR. SHORE: Last point on specific performance.  
14 This concept has been floated somehow by Mr. Friedman that  
15 there could be specific performance of one plan investor and  
16 not all plan investors. That just can't work. There's no way  
17 to have specific performance of this deal without each of the  
18 plan investors being there with their full amount of the  
19 commitment.

20 THE COURT: Why not ADAH and Appaloosa alone?

21 MR. SHORE: Because they are not liable for the  
22 full amount of the purchase price.

23 THE COURT: Why?

24 MR. SHORE: Because the contract does not commit  
25 them to be full amount of the purchase price.

1                   THE COURT: Other than the \$250 million --

2                   MR. SHORE: No, the actual commitments that we are  
3 required to buy in 2(a).

4                   THE COURT: Now, ADAH, you'd better walk me  
5 through that, because that's not my understanding. The  
6 individual caps on liability -- on joint and several liability  
7 only apply to the other investors.

8                   MR. SHORE: No, but the actual commitment to fund  
9 -- what we're talking about here is a specific performance.

10                  THE COURT: But it's joint and several liability  
11 for a breach and once that happens unless you're capped ADAH  
12 has 100 percent joint and several liability.

13                  MR. SHORE: No, but one of the conditions here is  
14 that everybody else is funded. So you can't force a closing --

15                  THE COURT: No, it's a willful breach. That's  
16 all. Once there's a willful breach everyone is jointly and  
17 severally liable. Am I missing that?

18                  MR. SHORE: Specific performance requires that all  
19 of the terms of the contract are being performed. You can't  
20 perform all the terms of the contract -- the debtors can't just  
21 say --

22                  THE COURT: The contract -- you've been arguing to  
23 me for six hours now that the contract is every provision --  
24 one of the provisions of it says that if anyone wilfully  
25 breaches ADAH is jointly and severally liable for the whole

1 thing. That's what they would enforce.

2 MR. SHORE: But that would be in a damage concept;  
3 right? You can't have a closing of this transaction --  
4 specific performance is an order --

5 THE COURT: Why not? ADAH agreed to do that.

6 MR. SHORE: No, ADAH, subject to the caps and  
7 subject to its ability to perform has committed to a specific  
8 amount of money and --

9 THE COURT: And if someone else wilfully breaches,  
10 their share too.

11 MR. SHORE: Their share, too, but not in the  
12 context of requiring a performance of the agreement. I mean  
13 this is not a --

14 THE COURT: As far as ADAH is concerned it's their  
15 performance. You say that's not a contractual obligation?

16 MR. SHORE: No, I do not believe that the contract  
17 is fairly read. It's not an issue of today other than the  
18 concept that there can be specific performance of this contract  
19 without all the plan investors being there.

20 THE COURT: Well, then it is an issue for today.

21 MR. SHORE: It's an issue in the context of is  
22 this specific performance remedy available? The cap on  
23 liability here does apply to ADAH, it's 250. It's 250. It  
24 does not have the sublimit --

25 THE COURT: We've been over that point.

1                   MR. SHORE: But it's not an instance in which the  
2 only parties who are allowed to assert the cap with respect to  
3 the transaction are the others who have the specified  
4 sublimits. You can't say the others are permitted to use their  
5 cap on liability where we're going to add specific performance  
6 because then it's avoiding the cap which is being used to let  
7 the others out.

8                   THE COURT: Well, what if it's the case that the  
9 only bad conduct was Appaloosa's? Then that seems to be  
10 clearly consistent with the contract as written that Appaloosa  
11 would have to perform consistent with its role as being the  
12 lead investor.

13                   MR. SHORE: Yes, I --

14                   THE COURT: I don't see how Appaloosa can engage  
15 in bad conduct that would be sufficient to get it out from  
16 under the cap or force it to specifically perform and then  
17 plead that because one of its co-investors was not acting badly  
18 it can be relieved of that obligation. That just doesn't seem  
19 right to me.

20                   MR. SHORE: No, and as I said I think if what  
21 we're talking about is a particularized allegation of the bad  
22 acts and responding to the bad acts, that's a different thing  
23 and that is not even on the allegations here sufficient to wipe  
24 out a cap to permit a \$2.5 billion transaction to go forward.  
25 That's the issue and I don't think that that's necessarily even

1 what they're pleading but --

2 THE COURT: Why wouldn't it be sufficient on a  
3 motion to dismiss basis?

4 MR. SHORE: But I'm saying I don't think that's  
5 what they're pleading.

6 THE COURT: But it's in the complaint. Why  
7 wouldn't it be sufficient?

8 MR. SHORE: Why?

9 THE COURT: Why wouldn't it be sufficiently a bad  
10 act to invoke Kalisch and the other cases?

11 MR. SHORE: Because Kalisch is only going to apply  
12 to the act you're talking about; right? I mean if they want to  
13 plead with respect to talking that Appaloosa -- and falsely  
14 pleaded so -- shut down the capital markets such that the only  
15 reason they couldn't get the debt finances because that was  
16 going on; right?

17 THE COURT: Right.

18 MR. SHORE: If they showed that, that the only  
19 reason they couldn't, we're talking about different damages  
20 than they weren't able to get exit finance that didn't close  
21 the transaction.

22 THE COURT: You think there has to be a specific  
23 tie-in to the damages? You don't think it's enough to say that  
24 in addition to the normal contractual undertakings the party  
25 you were in a contract with was working in improper and

1 egregious ways to subvert the contract is enough to take it out  
2 of the specific performance?

3 MR. SHORE: I think it isn't enough to take it out  
4 of specific --

5 THE COURT: You think it is?

6 MR. SHORE: I'm misphrasing that.

7 THE COURT: It isn't enough to take it out of  
8 specific performance?

9 MR. SHORE: It isn't enough to override the entire  
10 cap with respect to the entire transaction is what I'm saying.

11 THE COURT: Because?

12 MR. SHORE: Because I don't think the cases read  
13 that way. I don't think that what ends up is happening is one  
14 bad act voids the entire limitation on liability. I think it  
15 applies to the conduct. So there does have to be a tie. It's  
16 not an issue that was raised by the debtors. It's kind of hard  
17 to brief this on the fly.

18 So if Your Honor has no further questions I think  
19 I'm finished.

20 THE COURT: I'm just thinking this point through.

21 [Pause in proceedings.]

22 THE COURT: Okay.

23 MR. SHORE: Thank you, Your Honor.

24 MR. LACEY: Your Honor, first, I think we've made  
25 some progress as far as Goldman Sachs is concerned. Right

1 before lunch I pointed out to you that the two paragraphs of  
2 the complaint in which Goldman Sachs is supposedly alleged to  
3 have acted in concert with the other defendants does not say  
4 anything like that, and I assume that Mr. Friedman had a chance  
5 to look at the complaint over lunch and did not respond to  
6 that. So I take it that we are now done with concerted action.  
7 There's no allegation of concerted action.

8                   Mr. Friedman also did not say that there's any  
9 allegation in the complaint that Goldman Sachs failed to use  
10 reasonable best efforts. But he did make what I thought was a  
11 shocking assertion that I had admitted that Goldman Sachs  
12 failed to use reasonable best efforts and I said --

13                   THE COURT: No, he said that your pleading said  
14 that you stood aside and waited and he equated that to a breach  
15 of -- he didn't say you admitted that, he just said that you  
16 acknowledged that Goldman Sachs said, we don't have a dog in  
17 this fight, our money is here and you tell us when the closing  
18 is.

19                   MR. LACEY: Your Honor, I think the record will  
20 reflect that he did not refer to anything in the complaint. He  
21 said that my presentation here amounted to an assertion that  
22 Goldman Sachs did nothing. I did not say that Goldman Sachs  
23 did nothing and Mr. Friedman knows that Goldman Sachs did not  
24 do nothing.

25                   THE COURT: I don't think he said you did nothing,

1 I think he said you did nothing proactive other than being  
2 ready to close.

3 MR. LACEY: As he also knows and as the Court  
4 knows, I personally told Mr. Butler that Goldman Sachs would  
5 close if everyone else did, that we were not going to raise any  
6 objections.

7 THE COURT: He said --

8 MR. LACEY: Mr. Butler said it would be immensely  
9 helpful if I wrote a letter confirming that.

10 THE COURT: Right.

11 MR. LACEY: We did write a letter confirming that.  
12 To the best of my knowledge that is the only thing that Delphi  
13 asked Goldman Sachs to do to help get this deal done and  
14 Goldman Sachs did it.

15 THE COURT: I appreciate that. I think that the  
16 point he was making, and I tell you I have some skepticism  
17 about it, is that, without alleging anything more, the mere  
18 fact that there is a reasonable best efforts provision in there  
19 required Goldman somehow to be more proactive than that.

20 MR. LACEY: Well, I'd like to just reinforce that  
21 skepticism. You mentioned this morning that Goldman Sachs was  
22 criticized before the EPCA amendment was entered into by trying  
23 to talk to somebody else. It was shut down, we got an angry  
24 letter --

25 THE COURT: But not by the debtors. The debtors

1 weren't --

2 MR. LACEY: No, that's correct but we were told  
3 not to.

4 THE COURT: By Appaloosa.

5 MR. LACEY: All of the conduct of the other  
6 investors, that is other than ADAH and Goldman Sachs, which  
7 forms the basis of the pleaded claim of failure to use  
8 reasonable and best efforts relate to discussions pursuant to  
9 the common interest agreement and it is affirmatively alleged  
10 that Goldman Sachs did not sign that. The effective course is  
11 that nobody would talk to Goldman Sachs. It cannot be right  
12 that you can hang people out to dry, that you can assert a  
13 claim for breach of reasonable best efforts by entering into a  
14 common interest agreement and also assert that Goldman Sachs  
15 breached a duty of reasonable efforts by not signing it and  
16 being excluded from all the discussions.

17 At least, Your Honor, I think this is -- just to  
18 be clear -- as a number of people have pointed out, in 11(b),  
19 11(b) begins with a release by Delphi of all of the investors  
20 of any claim other than a claim for willful breach. In the  
21 absence of any allegation concerning anything that Goldman  
22 Sachs should have done that it failed to do, much less any  
23 allegation that Goldman Sachs knew or had any reason to know it  
24 was supposed to be doing something it didn't do, nobody could  
25 say that there has been the claim of willful breach pleaded on

1 the basis of the best efforts clause. There is no claim.  
2 There is a failure to state a claim for which relief may be  
3 granted for any breach of this agreement by Goldman Sachs and a  
4 willful breach.

5 THE COURT: Well, by Goldman Sachs; right.

6 MR. LACEY: That's correct. That's all I'm  
7 talking about.

8 THE COURT: Okay.

9 MR. LACEY: Now, I just want to mention in passing  
10 that --

11 THE COURT: I mean I take it you mean that simply  
12 by interpreting "willful" as "intentional" --

13 MR. LACEY: That's correct --

14 THE COURT: -- because there's no statement that  
15 there was even an intentional --

16 MR. LACEY: -- taking at the lowest level that  
17 whatever scienter -- it clearly has some scienter requirement.

18 THE COURT: Right.

19 MR. LACEY: And since there's no pleading of  
20 anything, not even the identification of the thing that Goldman  
21 Sachs is supposed to have done and no assertion whatsoever that  
22 it knew or should have known or ought to have known or in  
23 exercise of reasonable care would have known, there can't be a  
24 willful breach.

25 THE COURT: Right. Okay.

1                   MR. LACEY: Now, the one last thing is I just want  
2 to clear the air about this alternative transaction fee. If  
3 you look at Schedule 2 to the EPCA you will see that Goldman  
4 Sachs is in the unique position of being the only defendant  
5 that is entitled to zero of any alternate transaction fee at  
6 this point. It's not entitled to it, it's never asked for it,  
7 it's never even arguably been part of a group that asked for  
8 it. So to the extent that has any relevance, it is not  
9 relevant to Goldman Sachs.

10                  Thank you, Your Honor.

11                  THE COURT: Okay. Just really briefly, Mr.  
12 Friedman, if you have anything to say. If you don't then --

13                  MR. FRIEDMAN: Just a couple of things, Your  
14 Honor.

15                  Delphi, if necessary, could and would amend its  
16 pleading to allege that Merrill and Goldman and the other non-  
17 Appaloosa defendants knew or were wilfully blind to activities  
18 that were going on by Appaloosa to avoid its obligations under  
19 the EPCA and the commitment letter agreements.

20                  All of these plan investors were reaping the  
21 benefits of the millions of dollars in fees being paid by  
22 Delphi pursuant to the EPCA and the notion that they did not  
23 know what Appaloosa was doing is something that Delphi believes  
24 is just ludicrous and if that needs to be alleged expressly in  
25 the complaint, Delphi would be prepared to do that.

1 THE COURT: Okay. First of all, does anyone have  
2 anything else to say?

3 | [No response.]

4 THE COURT: When you were all before me on  
5 Delphi's scheduling motion, I said that I would rule promptly  
6 and I will. I'll rule from the bench, but I'm going to do that  
7 Monday morning. I want to look at a couple of points that were  
8 raised by the parties this afternoon and so I will give an oral  
9 ruling Monday at ten o'clock.

10 There will be an open 800 line as there was today.  
11 I'll vary my normal rule, which is that counsel who are located  
12 in New York should be here for a hearing. This isn't a  
13 hearing, it's an oral ruling, so unless you want to be here in  
14 person you can dial in and I'll ask the debtors to set up that  
15 line. It's obviously dialed in for listen only, and, again,  
16 it's just to give a ruling, I'm not going to hear further  
17 arguments and, frankly, if someone wants to ask for a  
18 clarification or something like that, they should be here in  
19 person.

20 So I will see you all at ten o'clock on Monday.

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I certify that the foregoing is a transcript from an  
electronic sound recording of the proceedings in the above-  
entitled matter, except where, as indicated, the Court has  
modified the transcript.

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MARY GRECO

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10 Dated: July 29, 2008

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